278 N.C. App.—No. 4 Pages 608-812

ADVANCE SHEETS

OF

CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

MARCH 8, 2022

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COURT OF APPEALS

CASES REPORTED

FILED 3 AUGUST 2021

CASES REPORTED WITHOUT PUBLISHED OPINIONS

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N.C. COURT OF APPEALS
2022 SCHEDULE FOR HEARING APPEALS

Cases for argument will be calendared during the following weeks:

January	10 and 24
February	7 and 21
March	7 and 21
April	4 and 25
May	9 and 23
June	6
August	8 and 22
September	5 and 19
October	3, 17, and 31
November	14 and 28
December	None (unless needed)

Opinions will be filed on the first and third Tuesdays of each month.

IN RE E.A.C.

[278 N.C. App. 608, 2021-NCCOA-298]

IN THE MATTER OF E.A.C., P.A.C., J.M.C., AND J.C.-B.

No. COA20-835

Filed 3 August 2021

1. Child Abuse, Dependency, and Neglect—permanency planning hearing—notice—waiver

In a neglect and dependency case where the trial court entered a permanency planning order after a hearing that was designated as a ninety-day review hearing, respondent-mother waived her right to notice of a permanency planning hearing under N.C.G.S. § 7B-907(a) by attending the hearing, participating in it, and failing to object to the lack of notice.

2. Child Abuse, Dependency, and Neglect—permanency planning—primary plan of reunification—eliminated—sufficiency of findings

The trial court's review order and permanency planning orders in a neglect and dependency case were vacated and remanded where the court had established reunification as the primary permanent plan at the initial disposition hearing but then eliminated reunification as a permanent plan at a subsequent hearing. Contrary to respondent-mother's argument, it was legally permissible for the court to eliminate reunification after it had already been part of the initial permanent plan. However, the court erred in eliminating reunification where it failed to enter sufficient findings of fact indicating whether reunification efforts would have been successful, and instead only entered findings showing that respondent-mother was unable to make progress toward reunification because of her status as an undocumented immigrant and her inability to obtain a U Visa.

3. Child Abuse, Dependency, and Neglect—permanent plan of reunification—eliminated—trial court's refusal to list steps for regaining custody

The trial court in a neglect and dependency case neither abused its discretion nor acted under a misapprehension of the law when, after removing reunification as a primary permanent plan, it told respondent-mother's counsel that it was not obligated to list what respondent-mother had to do to regain custody of her children. Under N.C.G.S. § 7B-904, courts have the discretion to direct parents to certain orders and enter dispositions that clearly spell out

what parents must do to regain custody. Moreover, a family services agreement had been in place for some time that respondent-mother was aware of and that delineated the specific steps she needed to take to regain custody, and therefore any injury caused by the court's refusal to list those steps was harmless.

Appeal by respondent-mother from orders entered 25 March 2020 and 18 September 2020 by Judge Warren McSweeney and Judge Regina M. Joe respectively in Hoke County District Court. Heard in the Court of Appeals 9 June 2021.

Parent Defender Wendy C. Sotolongo, by Deputy Parent Defender Annick Lenoir-Peek, for appellant-respondent-mother.

The Charleston Group, by Jose A. Coker, R. Jonathan Charleston, and Charles R. Smith, for petitioner-appellee Hoke County Department of Social Services.

Matthew D. Wunsche for petitioner-appellee Guardian ad Litem.

ARROWOOD, Judge.

¶ 1 Respondent-mother appeals from a ninety-day review order and two permanency planning orders. Respondent-mother contends the trial court erred in setting a permanent plan that did not include reunification, that the Hoke County Department of Social Services ("DSS") failed to provide reasonable reunification efforts, and that the trial court could not grant guardianship of the children to foster parents without a finding that respondent-mother was unfit or had acted inconsistently with her constitutionally protected status. For the following reasons, we vacate the trial court's orders and remand for a new hearing.

I. Background

¶ 2 In July 2015, respondent-mother was shot in the head by her ex-boyfriend. The shooting caused respondent-mother to suffer a traumatic brain injury. On 8 October 2017, respondent-mother began acting erratically. Respondent-mother's brother called law enforcement officers and respondent-mother was hospitalized overnight due to suicidal ideations.

¶ 3 On 9 October 2017, DSS received a report alleging improper supervision, improper discipline, and an injurious environment involving J.M.C.

("Julieta"), P.A.C. ("Patricio"), and E.A.C. ("Emmanuel").[1] DSS observed injuries to Julieta's face. Although respondent-mother denied causing the injuries, Julieta, Patricio, and Emmanuel attributed the injuries to respondent-mother striking Julieta in the nose with a knife. DSS and respondent-mother entered into a Safety Agreement dated 9 October 2017. As part of the Safety Agreement, respondent-mother agreed to seek domestic violence services and engage in mental health services. DSS sought to place Julieta, Patricio, and Emmanuel with their maternal uncle. On 19 December 2017, the Cumberland County Department of Social Services notified DSS of pending criminal charges against the maternal uncle for sexual abuse.

¶ 4 On 20 December 2017, DSS filed petitions alleging Julieta, Patricio, and Emmanuel as dependent and neglected under N.C. Gen. Stat. §§ 7B-101(9) and 7B-101(15). DSS placed Julieta, Patricio, and Emmanuel in the care of Shanley and Theresa Morgan ("Morgans"). On 10 July 2018, by consent of all parties, the trial court appointed respondent-mother a Guardian *ad litem* ("GAL") under N.C. R. Civ. P. 17 due to her traumatic brain injury. On 29 October 2018, the trial court adjudicated Julieta, Patricio, and Emmanuel as dependent and neglected. The trial court filed a continuance order on 3 December 2018 keeping Julieta, Patricio, and Emmanuel in DSS custody.

¶ 5 On 3 December 2018, the UNC Medical Center in Chapel Hill notified DSS of J.C.-B.'s ("Juliana") birth. At the time of Juliana's birth, respondent-mother did not have stable housing or gainful employment. DSS also received information that respondent-mother had attempted to coordinate an illegal adoption of Juliana. On 5 December 2018, DSS filed a petition alleging Juliana as dependent and neglected. DSS obtained nonsecure custody of Juliana and placed her with the Morgans along with her older siblings. On 1 February 2019, the trial court adjudicated Juliana as dependent and neglected.

¶ 6 The trial court conducted four hearings during the dispositional phase: 15 March 2019, 27 September 2019, 6 March 2020, and 19 June 2020.

¶ 7 At the 15 March 2019 hearing, respondent-mother entered into an Out of Home Family Services Agreement ("OHFSA") in which she agreed to: (1) maintain stable employment or income to care for the needs of the juveniles; (2) participate in parenting classes; (3) maintain stable hous-

1. Pseudonyms are used throughout the opinion to protect the identity of the juveniles and for ease of reading. The parties have stipulated to the aforementioned pseudonyms. All four children are at times referenced collectively as "juveniles."

ing; (4) participate in mental health therapy; and (5) visit the juveniles to maintain a bond. DSS recommended a primary plan of reunification with a concurrent plan of guardianship to a court-approved caretaker, which the trial court adopted in the disposition order. Disposition for all four children was entered on 25 March 2019.

¶ 8 DSS encountered several barriers in respondent-mother's achieving the primary plan of reunification. While conducting a home study of respondent-mother's residence, DSS observed several issues, including wiring hanging from the ceiling, holes in the floor, scattered debris throughout the house, lack of proper heating, and an insufficient number of beds for the juveniles. Additionally, respondent-mother's status as an undocumented immigrant created difficulty in obtaining employment and participating in parenting classes. DSS referred respondent-mother to Catholic Charities of Raleigh's office in Fayetteville to assist respondent-mother in applying for U Nonimmigrant Status as a victim of a violent crime ("U Visa"). Respondent-mother did not file an application or provide the necessary documentation to secure a U Visa.

¶ 9 In July 2019, respondent-mother contacted DSS to execute Relinquishments of Minor for Adoption ("Relinquishments") for the juveniles. Respondent-mother did not have counsel present, and upon receiving the unsolicited request, DSS advised respondent-mother to confer with her counsel. After respondent-mother conferred with her attorney, respondent-mother requested to independently proceed with the Relinquishments. DSS provided respondent-mother with Relinquishments in Spanish and explained their ramifications. Respondent-mother signed the Relinquishments of her own volition and free will.

¶ 10 The next hearing was conducted on 27 September 2019. The trial court set aside the Relinquishments upon respondent-mother's motion to have them rescinded. The trial court set aside the Relinquishments because respondent-mother's GAL was not present at the time of the signatures. In the order setting aside the Relinquishments, the trial court found that DSS had not forced, coerced, or threatened respondent-mother to sign the Relinquishments.

¶ 11 After addressing the Relinquishments, the trial court proceeded with the review hearing. At the time of the hearing, Julieta, Patricio, and Emmanuel had been in DSS custody for 646 days, and Juliana for 296 days. At the hearing, DSS recommended changing the primary plan for Julieta, Patricio, and Juliana from reunification to guardian-

ship and changing the concurrent plan from guardianship to custody.[2] Respondent-mother's trial counsel objected to the proposed change in primary and concurrent plans. Over respondent-mother's objection, the trial court changed the primary plans for Julieta, Patricio, and Juliana to guardianship with a court-approved caretaker with a concurrent plan of custody to a court-approved caretaker. The Ninety Day Review Order was entered 4 November 2019.

¶ 12 Based on respondent-mother's failure to complete the requirements of her OHFSA, DSS requested to be relieved of further reunification efforts. DSS contacted multiple providers to assist respondent-mother with employment and housing services but failed to obtain assistance due to respondent-mother's undocumented status. DSS contacted TT&T Services ("TT&T") in Raeford, North Carolina regarding parenting classes. TT&T did not have a Spanish-speaking service provider, and Julieta, Patricio, and Emmanuel did not meet TT&T's age criteria. DSS also contacted the Cooperative Extension Parents as Teachers program. Respondent-mother did not meet the program's criteria for services because the juveniles did not reside with respondent-mother and some were over the age of five.

¶ 13 DSS also contacted several service providers to assist respondent-mother in obtaining mental health services with a Spanish-speaking therapist, including TT&T, Greater Visions Behavioral Health, Renew Counseling Center of Raeford, and Daymark Recovery Center ("Daymark"). Daymark refused to provide services to respondent-mother due to her undocumented status. DSS also attempted to schedule therapy for respondent-mother at the Hoke County Health Department, but services were unavailable due to respondent-mother's undocumented status.

¶ 14 After these unsuccessful attempts to obtain assistance, DSS transported respondent-mother to the Catholic Charities of Raleigh's office in Fayetteville to seek assistance in applying for a U Visa. DSS provided an interpreter to assist at the appointment. At the appointment, respondent-mother was informed that the U Visa application required her to obtain birth certificates for all of her children, including those born in Mexico, and to provide financial or employment statements so that service fees could be waived. Respondent-mother did not provide the required documentation and her U Visa application was never processed.

¶ 15 DSS also attempted to assist respondent-mother in obtaining neurological services. DSS scheduled an appointment for respondent-mother

2. Emmanuel's primary plan was not changed because DSS was awaiting the results of a paternity test.

at the Duke University School of Medicine Department of Neurology ("Duke Neurology") in Durham, North Carolina. DSS intended to use reunification funds to financially assist respondent-mother with the services at Duke Neurology. DSS was informed that Duke Neurology would not provide services due to respondent-mother's undocumented status.

¶ 16 The trial court found that respondent-mother had not achieved stable housing, employment, participated in parenting classes, or mental health services as required by the OHFSA. The trial court relieved DSS of further reunification efforts to respondent-mother in the 4 November 2019 review order.

¶ 17 The next permanency planning hearing was conducted on 6 March 2020. At the time of the hearing, Julieta, Patricio, and Emmanuel had been in DSS custody for over 808 days, and Juliana for 450 days. On 25 March 2020, the trial court entered a permanency planning order granting guardianship of Patricio, Julieta, and Juliana to the Morgans.[3] In the permanency planning order, the trial court found that respondent-mother had waived her constitutionally protected status because she never provided DSS with the documentation required to obtain a U Visa and because she had not acquired stable housing throughout the pendency of the cases. Apart from respondent-mother's inability to complete her OHFSA, the Morgans provided permanence for the juveniles. The Morgans provided for the juveniles' medical and educational needs, and the juveniles established a strong bond with the Morgans, enjoying their own bedrooms and vacations together.

¶ 18 The last permanency planning hearing regarding Emmanuel was conducted on 19 June 2020. Although an assessment was completed on the home of a paternal uncle in Indiana, the trial court received evidence that Emmanuel feared being removed from the Morgans and separated from his siblings. The trial court determined that it was in Emmanuel's best interest to remain with the Morgans. The trial court found that respondent-mother had waived her constitutionally protected status because she never provided DSS with the documentation required to obtain a U Visa and because she had not acquired stable housing throughout the pendency of the case. The permanency planning order granting guardianship of Emmanuel to the Morgans was entered 18 September 2020.

¶ 19 Respondent-mother filed written notices of appeal on 30 June 2020 and 23 September 2020. On 28 July 2020, respondent-mother filed a

3. Emmanuel's case was bifurcated from his siblings due to the aforementioned paternity test.

petition for *writ of certiorari* to review the 4 November 2019 Ninety Day Review Order.[4] This Court allowed respondent-mother's petition on 17 August 2020.

II. Discussion

¶ 20 Respondent-mother raises several arguments on appeal. First, respondent-mother contends the trial court should not have acted as if it was holding a permanency planning hearing because the hearing was noticed as a review hearing and respondent-mother's trial counsel objected. Second, respondent-mother argues the trial court operated under a misapprehension of law by "eliminat[ing] reunification efforts at a first review hearing," by setting "a permanent plan which did not include reunification," and by telling trial counsel that the trial court was not obligated to "list what the [respondent-m]other had to do to regain custody of her children." Third, respondent-mother argues that DSS failed to provide reasonable reunification efforts and the trial court's findings are not supported by competent evidence. Finally, respondent-mother contends the trial court's finding that respondent-mother acted inconsistently with her constitutionally protected status was contrary to the evidence presented.

A. Notice of Hearing

¶ 21 **[1]** There is a sequential process for abuse, neglect, or dependency cases, wherein each required action or event must occur within a prescribed amount of time after the preceding stage in the case. *In re T.R.P.*, 360 N.C. 588, 593, 636 S.E.2d 787, 791-92 (2006). An adjudicatory hearing must be held no later than 60 days after the filing of a petition, and an initial dispositional hearing follows the adjudication. N.C. Gen. Stat. §§ 7B-801(c), 7B-901 (2019). A review hearing must be "held within 90 days from the date of the initial dispositional hearing . . . [and] at least every six months thereafter." N.C. Gen. Stat. § 7B-906.1(a) (2019). "Within 12 months of the date of the initial order removing custody, there shall be a review hearing designated as a permanency planning hearing." N.C. Gen. Stat. § 7B-906.1(a). Hearings after an initial permanency planning hearing are automatically designated as permanency planning hearings. N.C. Gen. Stat. § 7B-906.1(a). Prior to a review hearing, the clerk "shall give 15 days' notice of the hearing and its purpose" to parents and other parties. N.C. Gen. Stat. § 7B-906.1(b). Although the Juvenile Code has established a sequential hearing process, courts may combine and conduct

4. Respondent-mother's petition for *writ of certiorari* was filed prior to the pendency of this appeal and is docketed under No. P20-417.

the adjudicatory, dispositional, and permanency planning hearings on the same day. *In re C.P.*, 258 N.C. App. 241, 244, 812 S.E.2d 188, 191 (2018).

¶ 22 While dispositional hearings can be combined, a court cannot enter a permanency planning order at a hearing for which proper notice was not given, unless proper notice is waived. *In re S.C.R.*, 217 N.C. App. 166, 171, 718 S.E.2d 709, 713 (2011). "[A] party waives its right to notice under section 7B-907(a)[5] by attending the hearing in which the permanent plan is created, participating in the hearing, and failing to object to the lack of notice." *In re J.P.*, 230 N.C. App. 523, 526, 750 S.E.2d 543, 545 (2013) (footnote omitted) (citing *In re J.S.*, 165 N.C. App. 509, 514, 598 S.E.2d 658, 662 (2004)).

¶ 23 Respondent-mother argues the trial court erred in conducting a permanency planning hearing without providing adequate notice of the proceedings. We disagree. Respondent-mother attended and participated in the hearings on 15 March 2019 and 27 September 2019 and at the latter hearing objected to the proposed change in permanent plan but made no objection to holding a permanency planning hearing. Because respondent-mother attended and participated in the hearings and failed to object to the lack of notice, we hold that respondent-mother waived her right to notice under N.C. Gen. Stat. § 7B-906.1(b).

B. Elimination of Reunification Efforts & Misapprehension of Law

¶ 24 Respondent-mother raises three issues with respect to the trial court's permanency planning order: (1) the trial court erred in eliminating reunification efforts in an initial review hearing; (2) the trial court erred in setting a permanent plan that did not include reunification; and (3) the trial court misapprehended the law and its judicial role in stating that it was not obligated to "list what the [respondent-m]other had to do to regain custody of her children." Because the first two issues are intertwined, we discuss them together.

1. Eliminating Reunification at Initial Hearing

¶ 25 **[2]** At the permanency planning stage involving a neglected juvenile, the trial court must adopt concurrent permanent plans consisting of a primary and secondary plan. N.C. Gen. Stat. § 7B-906.2(a), (b) (2019). If determined to be in the juvenile's best interest, the trial court can adopt two of the six statutory plans, including adoption, guardianship, reinstatement of parental rights, and reunification. N.C. Gen. Stat.

5. N.C. Gen. Stat. § 7B-907(a) was repealed effective 1 October 2013 and recodified as N.C. Gen. Stat. § 7B-906.1(b).

§ 7B-906.2(a). When deciding which plans to impose, Chapter 7B instructs the trial court as follows concerning reunification:

> At any permanency planning hearing, the court shall adopt concurrent permanent plans and shall identify the primary plan and secondary plan. Reunification shall be a primary or secondary plan unless the court made findings under G.S. 7B-901(c) or G.S. 7B-906.1(d)(3), the permanent plan is or has been achieved in accordance with subsection (a1) of this section, or the court makes written findings that reunification efforts clearly would be unsuccessful or would be inconsistent with the juvenile's health or safety. The finding that reunification efforts clearly would be unsuccessful or inconsistent with the juvenile's health or safety may be made at any permanency planning hearing. Unless permanence has been achieved, the court shall order the county department of social services to make efforts toward finalizing the primary and secondary permanent plans and may specify efforts that are reasonable to timely achieve permanence for the juvenile.

N.C. Gen. Stat. § 7B-906.2(b).

¶ 26 The trial court must also make findings "which shall demonstrate the degree of success or failure toward reunification," including:

> (1) Whether the parent is making adequate progress within a reasonable period of time under the plan.
>
> (2) Whether the parent is actively participating in or cooperating with the plan, the department, and the guardian ad litem for the juvenile.
>
> (3) Whether the parent remains available to the court, the department, and the guardian ad litem for the juvenile.
>
> (4) Whether the parent is acting in a manner inconsistent with the health or safety of the juvenile.

N.C. Gen. Stat. § 7B-906.2(d). Our Supreme Court has stated in the context of orders ceasing reunification efforts that "[t]he trial court's written findings must address the statute's concerns, but need not

quote its exact language." *In re L.M.T.*, 367 N.C. 165, 168, 752 S.E.2d 453, 455 (2013).

> "The essential requirement at the review hearing is that sufficient evidence be presented to the trial court so that it can determine what is in the best interest of the child." In light of this objective, neither the parent nor the county department of social services bears the burden of proof in permanency planning hearings, and the trial court's findings of fact need only be supported by sufficient competent evidence.

Id. at 180, 752 S.E.2d at 462 (citations omitted) (cleaned up).

¶ 27 In a permanency planning hearing held pursuant to Chapter 7B, the trial court can only order the cessation of reunification efforts when it finds facts based upon credible evidence presented at the hearing that support its conclusion of law to cease reunification efforts. *In re Weiler*, 158 N.C. App. 473, 477, 581 S.E.2d 134, 137 (2003).

¶ 28 Under N.C. Gen. Stat. § 7B-906.2(b), reunification must be either a primary or secondary plan unless: (1) the trial court makes findings under §§ 7B-901(c) or 7B-906.1(d)(3); (2) the permanent plan is or has been achieved in accordance with § 7B-906.2(a1), or (3) the trial court makes written findings that reunification efforts clearly would be unsuccessful or would be inconsistent with the juvenile's health or safety. N.C. Gen. Stat. § 7B-906.2(b).

¶ 29 In this case, the 15 March 2019 hearing was designated as an initial dispositional hearing but became a combined dispositional and permanency planning hearing. In the 25 March 2019 disposition order, the trial court adopted "the primary plan of reunification and the concurrent plan of guardianship to a court-approved caretaker, as these plans of care for establishing permanency for the Juveniles at this time[.]" Accordingly, because reunification was part of the initial permanent plan, respondent-mother's argument that the trial court could not as a matter of law eliminate reunification at the subsequent 27 September 2019 hearing is without merit.

¶ 30 Under *In re C.P.*, "a trial court can cease reunification efforts at the first permanency planning hearing if necessary findings of fact were made that showed reunification would be unsuccessful" or would be inconsistent with the juvenile's health or safety. *In re C.P.*, 258 N.C. App. at 245, 812 S.E.2d at 191. Here, the trial court made the following relevant findings of fact:

> 54. The primary plan for [Patricio, Julieta, and Juliana] shall be changed from reunification concurrent with guardianship to a court-approved caretaker to guardianship with a court-approved caretaker concurrent with custody to a court-approved caretaker, *as this is the best plan to achieve a safe and permanent home for [Patricio, Julieta, and Juliana] within a reasonable time.*
>
> . . . .
>
> 58. [Respondent-m]other has remained available to [DSS], the Court, and the Juveniles' GAL.
>
> 59. [Respondent-m]other's efforts to obtain the U Visa by obtaining information about her children was not completed by [respondent-m]other.
>
> 60. The placement of the Juveniles with [respondent-m]other within the next six (6) months is *unlikely* due to the inability of [DSS] to establish services for [respondent-m]other due to her immigration status and the unavailability of services for [respondent-m]other in the Spanish language.
>
> 61. Return to the Juveniles' home would be contrary to their health and safety.

(emphasis added). The trial court also concluded as a matter of law that it would "be in the best interests of the Juveniles" that DSS be authorized to make decisions on behalf of the juveniles, for their care and placement to remain the responsibility of DSS, and for DSS to arrange or provide for foster care or other suitable placement for the juveniles, and that "[i]t would be contrary to the welfare and best interest of the Juveniles to return to the home of any of the Respondents."

¶ 31 In order to cease reunification efforts and remove reunification as a primary or secondary plan, the trial court was required to make necessary findings of fact that showed reunification would be unsuccessful or inconsistent with the juveniles' health or safety. Although the trial court's findings of fact do provide that changing the primary plan was "the best plan to achieve a safe and permanent home for [the juveniles] within a reasonable time[,]" and that returning "to the Juvenile's home would be contrary to their health and safety[,]" the findings do not pro-

vide that reunification would be "clearly unsuccessful" as required by N.C. Gen. Stat. § 7B-906.2(b). Instead, the findings provide that placing the juveniles with respondent-mother within the next six months would be "unlikely."

¶ 32 With respect to the findings required by N.C. Gen. Stat. § 7B-906.2(d), the trial court found that respondent-mother had remained available to the Court, DSS, and GAL, but did not specifically address the other three required findings. Rather than addressing whether respondent-mother was making adequate progress within a reasonable period of time, whether respondent-mother was actively participating in or cooperating with the plan, or whether respondent-mother was acting in a manner inconsistent with the health or safety of the juveniles, the trial court simply stated that DSS was "unable to assist [respondent-m]other in accomplishing the issues addressed in her [OHFSA] due to the unavailability of services that can or will work with [respondent-m]other[,]" and that respondent-mother had not completed her efforts to obtain a U Visa.

¶ 33 These findings are insufficient to demonstrate the degree of success or failure towards reunification. The findings only demonstrate that DSS was unable to locate any services that could help respondent-mother progress towards reunification and that respondent-mother was unable to make progress towards reunification because she was unable to obtain a U Visa. We hold the trial court erred in removing reunification as a primary or secondary plan and in ceasing reunification efforts without making sufficient findings of fact. We vacate the trial court's orders and remand for further proceedings.

2. Misapprehension of Law

¶ 34 **[3]** "Reversal is warranted where a trial court acts under a misapprehension of the law." *In re M.K.*, 241 N.C. App. 467, 475, 773 S.E.2d 535, 541 (2015). "[W]here it appears that the judge below has ruled upon [a] matter before him upon a misapprehension of the law, the cause will be remanded . . . for further hearing in the true legal light." *In re S.G.V.S.*, 258 N.C. App. 21, 24, 811 S.E.2d 718, 721 (2018) (citation omitted).

¶ 35 We review an order ceasing reunification to determine "whether the trial court abused its discretion with respect to disposition." *In re J.H.*, 373 N.C. 264, 267, 837 S.E.2d 847, 850 (2020) (citations omitted). "An abuse of discretion occurs when the trial court's ruling is so arbitrary that it could not have been the result of a reasoned decision." *In re N.G.*, 186 N.C. App. 1, 10-11, 650 S.E.2d 45, 51 (2007) (quoting *In re Robinson*, 151 N.C. App. 733, 737, 567 S.E.2d 227, 229 (2002)), *aff'd*, 362 N.C. 229, 657 S.E.2d 355 (2008).

¶ 36 Respondent-mother contends that the trial court erred in stating "I don't think it's my position and authority to lay out the specific acts that your client has to do or should do" because under N.C. Gen. Stat. § 7B-904, "the trial court is authorized to enter dispositions that clearly spell out what a parent needs to do to regain custody." DSS cites N.C. Gen. Stat. § 7B-904 in asserting that "the court is authorized to direct certain orders to parents, but the court's authority is limited by the Juvenile Code." DSS further notes that an OHFSA had been in place since 2018 delineating the steps required for respondent-mother to regain custody of the juveniles.

¶ 37 We hold that the trial court exercised its discretion in choosing to decline enumerating specific requirements, and further hold that the trial court did not abuse its discretion in doing so. Respondent-mother was aware of and attempting to participate in the OHFSA at the time of the hearing, and any injury caused by the trial court's decision to not lay out the specific acts required of respondent-mother was harmless.

C. Remaining Arguments

¶ 38 Respondent-mother further contends the trial court's findings are not supported by any competent evidence because DSS failed to provide reasonable reunification efforts, and that the trial court could not grant guardianship of the children to the Morgans without a finding of unfitness or that respondent-mother acted inconsistently with her constitutionally protected parental status. Because we vacate the trial court's orders on other grounds, it is unnecessary to address respondent-mother's remaining arguments.

III. Conclusion

¶ 39 For the forgoing reasons, we hold that respondent-mother waived any objection to notice of the permanency planning hearings and that the trial court did not err in establishing reunification as a permanent plan at the initial hearing. We further hold that the trial court erred in ceasing reunification efforts and removing reunification as a permanent plan because the permanency planning order did not contain sufficient findings of fact. We vacate the trial court's orders and remand for a new permanency planning hearing.

VACATED AND REMANDED.

Judges TYSON and INMAN concur.

ANGARITA v. EDWARDS

[278 N.C. App. 621, 2021-NCCOA-397]

WILLIAM J. PARRA ANGARITA, PLAINTIFF
v.
MARGUERITE EDWARDS, DEFENDANT

No. COA20-846

Filed 3 August 2021

1. Appeal and Error—preservation of issues—pro se appellant —arguments waived—Appellate Rule 2 review

In a pro se defendant's appeal from a civil no-contact order entered against her, the Court of Appeals exercised its discretion under Appellate Rule 2 to consider two arguments that defendant failed to preserve for appellate review where, at any rate, the arguments lacked merit.

2. Trials—hearing—civil no-contact order—findings of fact paraphrasing testimony—reasonable inference drawn

In a matter between next-door neighbors, where the trial court entered a civil no-contact order against defendant, which included a finding of fact stating that defendant said, "plaintiff smells," defendant's argument that the trial court had misquoted her lacked merit. Rather, the trial court had accurately paraphrased testimony from the hearing and drew a reasonable inference from the many statements defendant made about plaintiff (for example, she testified that she "smelled a bad smell" when she passed by plaintiff's garage door, and plaintiff testified that she texted him statements like "my house stinks like skunks from you and your people, you stinky criminal").

3. Judges—duty of impartiality—hearing on civil no-contact order —interactions with defendant

During a hearing on plaintiff's request for a civil no-contact order against defendant, his next-door neighbor, the trial court neither acted with undue hostility toward defendant (who appeared pro se) nor otherwise abused its discretion when interacting with her where the judge only interrupted her in the interests of expediency and of ensuring that she complied with the rules of evidence. Further, there was no evidence that the judge's tone or attitude toward defendant stemmed from any sort of personal bias; instead, the record merely reflected the judge's disapproval of defendant's disorganized arguments and mode of presenting evidence.

4. Stalking—civil no-contact order—amended to include stalking—finding of stalking supported

In a matter between next-door neighbors, the trial court did not abuse its discretion in amending the no-contact order it entered against defendant by checking an additional box ordering her to "cease stalking the plaintiff." Although the court never explicitly ruled on stalking, the evidence and the court's findings of fact supported a finding that defendant stalked plaintiff by constantly accusing him of breaking into her home, threatening to have him arrested, yelling racist remarks at his family from her yard, posting a letter on her door calling him a "dangerous criminal," and texting him death threats. Therefore, the court most likely made a clerical mistake by not checking the additional box in the first order and properly corrected it via amendment, pursuant to Civil Procedure Rule 60(a).

5. Stalking—civil no-contact order—remedies under Chapter 50C—mental health evaluation

In a matter between next-door neighbors, the trial court did not abuse its discretion in ordering defendant to obtain a mental health evaluation as part of a no-contact order it entered on plaintiff's behalf. The court acted within its broad authority under Chapter 50C-5 to order the evaluation as "other relief deemed necessary and appropriate by the court" (N.C.G.S. § 50C-5(b)(7)), and the court reasonably based the remedy on defendant's testimony, which showed that she exhibited a number of concerning, delusional beliefs about plaintiff that led her to text him death threats and verbally harass him and his family on a regular basis.

6. Process and Service—failure to serve—written motion to dismiss—civil no-contact order

During a hearing on plaintiff's request for a civil no-contact order against defendant, his next-door neighbor, the trial court did not abuse its discretion by declining to consider defendant's pretrial motion to dismiss plaintiff's complaint. Defendant (who appeared pro se) failed to serve the written motion upon plaintiff, as required under Civil Procedure Rule 5, and never made an oral motion to dismiss during the hearing despite having the option to do so.

Judge GRIFFIN concurring in result.

Appeal by Defendant from an order entered on 5 August 2020 by Judge Paulina Havelka in Mecklenburg County District Court. Heard in the Court of Appeals 12 May 2021.

William J. Parra Angarita, pro se.

Marguerite Edwards, pro se.

JACKSON, Judge.

¶ 1 The issue in this case is whether the trial court erred or abused its discretion in granting a civil no-contact order against a *pro se* litigant. We conclude that the trial court committed no error or abuse of discretion and affirm the order.

I. Factual and Procedural Background

¶ 2 William Parra Angarita ("Plaintiff") and Marguerite Edwards ("Defendant") are next-door neighbors on Dominion Village Drive in Charlotte, North Carolina. Beginning sometime in February or March of 2020, Defendant began to suspect that someone was breaking into her house. On 7 March 2020, she reported the suspected break-ins to the police. She began to suspect Plaintiff was the perpetrator and reported his name to the police. According to Plaintiff, he has never been contacted by the police. Defendant has a security system and multiple cameras installed but has no video evidence of Plaintiff breaking into her house. Defendant claims to be suffering lasting health consequences due to the alleged break-ins.

¶ 3 From time to time, Plaintiff's children would accidentally throw soccer balls into Defendant's fenced, locked yard. On 23 March 2020, Plaintiff received a phone call from Defendant requesting that his children stop throwing balls into her yard. During this call, Defendant used "harsh language" towards Plaintiff's children. Defendant called Plaintiff again on 6 April 2020, this time threatening to call the police and making offensive, racist statements about Plaintiff and his family.

¶ 4 A series of escalating interactions ensued. Following a verbal altercation about the balls, Defendant threatened to have Plaintiff arrested, and Defendant alleges that at some point Plaintiff "came to her front door and rang her door bell several times in a rage." Defendant responded by posting a sign on her door that accused Plaintiff of breaking into her house and notifying the homeowners' association of the alleged break-ins.

¶ 5 Throughout these events, Defendant sent Plaintiff at least eight text messages with "derogatory, defamatory, and incendiary language," including some express or implied threats. Defendant also yelled accusations and racist remarks at Plaintiff's family from her property. Plaintiff's wife

and sister-in-law testified that Defendant shouted accusations and racist remarks directly at them on multiple occasions. Plaintiff states that the behavior of Defendant has caused significant stress for him and his family.

¶ 6 On 8 July 2020, Plaintiff filed a complaint in Mecklenburg County District Court, seeking a permanent civil no-contact order against Defendant under N.C. Gen. Stat § 50C-2, and requesting that the court bar Defendant from "verbally abusing any family members living in [Plantiff's] household and to stop yelling and shouting from her property towards ours," among other remedies. Defendant was served with the complaint on 18 July 2020. On 28 July 2020, Defendant filed (but apparently did not serve upon Plaintiff) an answer to the complaint and a written motion to dismiss.

¶ 7 A hearing was held on 4 August 2020 before the Honorable Paulina Havelka. Neither Plaintiff nor Defendant was represented by an attorney. During the hearing, testimony was heard from Plaintiff, Plantiff's wife, and Plaintiff's sister-in-law, who described the harassment they had faced from Defendant over the past year. Defendant also testified at the hearing, stating her belief that Plaintiff was continually breaking into her house, tampering with her belongings, and "doing criminal activities for unknown reasons." At several points, both Plaintiff and Defendant attempted to introduce documentary exhibits (such as a notarized statement from their neighbors, or emails from the local police department) but the court refused to admit the exhibits after ruling they were inadmissible hearsay.

¶ 8 At the conclusion of the parties' testimony, the trial court granted Plaintiff a permanent no-contact order against Defendant pursuant to § 50C-7. The trial court concluded that

> [Plaintiff] has suffered unlawful conduct by [D]efendant in that: Defendant continuously harasses Plaintiff and Plaintiff's household. Posts letters on Defendant's door with an arrow stating Plaintiff is a "dangerous criminal." In open court Defendant stated "Plaintiff smells" and does so while in her yard at Plaintiff and Plaintiff's family.

¶ 9 In its order, the trial court checked boxes indicating that Defendant: (1) shall not "visit, assault, molest, or otherwise interfere with" Plaintiff; (2) "cease harassment" of Plaintiff; (3) "not abuse or injure" Plaintiff; and (4) not contact Plaintiff "by telephone, written communication, or electronic means" for a period of one year. The trial court also added an additional handwritten order that Defendant

"shall obtain a mental health evaluation," with a review hearing scheduled for 8 December 2020.

¶ 10 On 5 August 2020, Defendant contacted the clerk of court and told her that she was having difficulty reading the court's written order due to its legibility. Later that same day, the court issued an "amended" no-contact order, that was otherwise identical with the exception of checking an additional box that "the Defendant cease stalking the Plaintiff." Defendant filed a timely written notice of appeal from the court's amended order on 14 August 2020.

II. Analysis

¶ 11 In her *pro se* appeal, Defendant raises five arguments, contending that: (1) the trial court erred by misquoting her in the findings section of the no-contact order; (2) the trial court was "exceptionally hostile" to Defendant during the hearing; (3) the trial court erred by making an improper amendment to the no-contact order; (4) the trial court erred by assigning her a mental health evaluation; and (5) the trial court erred by failing to consider her motion to dismiss. We disagree and hold that the trial court committed no error or abuse of discretion.

A. Preservation

¶ 12 **[1]** As a threshold matter, we must address whether Defendant has properly preserved her arguments for appellate review. Our Appellate Rules provide that

> [i]n order to preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection, or motion, stating the specific grounds for the ruling the party desired the court to make . . . It is also necessary for the complaining party to obtain a ruling upon the party's request, objection, or motion.

N.C. R. App. P. Rule 10(a)(1).

¶ 13 In interpreting this Rule, we have long held that "where a theory argued on appeal was not raised before the trial court, the law does not permit parties to swap horses between courts in order to get a better mount in the appellate courts." *State v. Holliman*, 155 N.C. App. 120, 123, 573 S.E.2d 682, 685 (2002) (internal marks and citations omitted). Accordingly, where a defendant "impermissibly presents a different theory on appeal than argued at trial, [the] assignment of error [is] not properly preserved" and is "waived by [the] defendant." *Id.* at 124, 573 S.E.2d at 686.

¶ 14 Here, Defendant has failed to preserve two issues—the trial court's failure to consider her motion to dismiss, and the trial court's alleged "undue hostility" during the hearing—because Defendant did not raise either of these issues before the trial court.[1] However, in our discretion we nevertheless choose to review all of Defendant's arguments, as none of the issues raised by Defendant show any error by the trial court.

¶ 15 We have previously addressed a similar scenario in *Seafare Corp. v. Trenor Corp.*, wherein the *pro se* defendants raised a number of issues on appeal that had not been raised before the trial court. Despite this waiver, we nevertheless reviewed the defendants' assertions of error, explaining:

> Defendants next assign error to the admission of much of plaintiff's evidence. Defendants failed, however, to object to the admission of any evidence . . . . An unrepresented party is not relieved of the duty to object to evidence in order to preserve the issue for appeal. Nevertheless, we have considered defendants' arguments set forth in their brief and conclude there was no prejudicial error.

Seafare Corp. v. Trenor Corp., 88 N.C. App. 404, 413, 363 S.E.2d 643, 650-51 (1988) (internal marks and citations omitted).

¶ 16 Likewise, despite Defendant's failure in the present case to preserve her arguments for appellate review, we exercise our discretion under Rule 2 to consider these arguments and conclude that the trial court committed no error. *See* N.C. R. App. P. 2.

B. Misquotation

¶ 17 **[2]** Defendant first argues that the trial court erred by misquoting her in the findings section of the no-contact order. We disagree and discern no error in the trial court's findings of fact. We review a trial court's findings of fact only to establish that they were supported by competent evidence:

> [W]hen the trial court sits without a jury, the standard of review on appeal is whether there was competent evidence to support the trial court's findings of fact

1. The remainder of Defendant's arguments were properly preserved because they involved either findings of fact or conclusions of law in the trial court's written order, or actions that the trial court took following the conclusion of the hearing (such as the amendment of the no contact order). *See* N.C. R. App. P. 10(a)(1) (noting that certain issues may be "deemed preserved" without any action taken by the appellant, such as "whether the judgment is supported by the verdict or by the findings of fact and conclusions of law").

> and whether its conclusions of law were proper in light of such facts. While findings of fact by the trial court in a non-jury case are conclusive on appeal if there is evidence to support those findings, conclusions of law are reviewable *de novo*.

Romulus v. Romulus, 215 N.C. App. 495, 498, 715 S.E.2d 308, 311 (2011) (internal marks and citations omitted).

¶ 18 Defendant's argument centers around an alleged misquotation by the trial court in the "Findings" section of the no-contact order. The trial court wrote that "In open court Defendant stated 'Plaintiff smells' and does so while in her yard at Plaintiff and Plaintiff's family." Defendant contends that this misquotation is incorrect and is grounds for reversal. We disagree.

¶ 19 While it is true that Defendant never spoke those exact words during the hearing, she did say a number of closely related phrases in her written and oral testimony. In her answer to Plaintiff's complaint and during the hearing, she stated, "I smelled a bad smell when I passed by the Plaintiff's open garage door" and "I knew who was breaking into my house . . . . I knew it was him by the smell." Plaintiff testified that Defendant texted her statements like "[e]very time I smell the horrible odor you put in my house I want to yell at you criminal" and "[m]y house stinks like skunks from you and your people, you stinky criminal." During cross examination, Plaintiff asked Defendant "can you explain how you say that [it] is a fact that I've been breaking into your house?" Defendant replied, "[t]he smell."

¶ 20 This Court has previously upheld findings of fact by trial courts in civil cases that paraphrase testimony and draw reasonable inferences therefrom. For example, in *In re Botros*, 265 N.C. App. 422, 828 S.E.2d 696 (2019), the respondent challenged the trial court's findings of fact by arguing that the findings did not accurately quote the words he spoke during the hearing. *Id.* at 429, 828 S.E.2d at 703. Specifically, the trial court's order found that "[i]mmediately upon appearing before [the trial court, the respondent] requested five minutes to 'collect' himself. [Respondent] appeared somewhat distressed and disoriented." *Id.* Whereas, the video recording of the proceeding revealed that he requested to "have one – one moment" before beginning, "without saying it was to 'collect' himself." *Id.* at 430, 828 S.E.2d at 703. This Court held that "[w]hile [the respondent] may not have used the precise words of the findings in his testimony, the findings reasonably paraphrase [his] testimony or *are inferences reasonably drawn from that testimony*." *Id.* (internal marks and citation omitted).

¶ 21 Here, the trial court's paraphrase that "Defendant stated 'Plaintiff smells' " was a reasonable inference from the variety of olfactory assertions made by Defendant during the hearing and in her written answer. There was thus sufficient "evidence as a reasonable mind might accept as adequate to support a conclusion" that Defendant had stated, in effect, that "Plaintiff smells." We hold that the trial court did not err by paraphrasing Defendant.

C. Exceptional Hostility

¶ 22 **[3]** Next, Defendant alleges that the trial court acted with undue hostility during the hearing, as indicated by the judge's interruptions, tone, and general treatment of her. We disagree and find no error by the trial court.

¶ 23 The North Carolina Constitution requires that "right and justice shall be administered without favor, denial, or delay." N.C. Const. art. I, § 18. Accordingly, "[t]he law imposes on the trial judge the duty of absolute impartiality." *State v. Fleming*, 350 N.C. 109, 125-26, 512 S.E.2d 720, 732 (1999) (internal marks and citation omitted). However, "[t]he trial judge also has the duty to supervise and control a defendant's trial, including the direct and cross-examination of witnesses, to ensure fair and impartial justice for both parties." *Id.* at 126, 512 S.E.2d at 732. "In evaluating whether a judge's comments cross into the realm of impermissible opinion, a totality of the circumstances test is utilized." *Id.* (internal marks and citation omitted).

¶ 24 Applying these principles to the remarks of the trial court here, and after conducting a thorough review of each alleged instance of improper conduct or hostility on the part of the trial judge, we detect no prejudicial error and reject Defendant's claim of "exceptional hostility."

¶ 25 Turning first to the interruptions, it is apparent that the trial judge interrupted only in the interests of expediency and to bring a *pro se* Defendant into compliance with the rules of evidence.[2] In this regard, the trial court's actions were helpful to Defendant, if anything. For example, the trial court avoided wasting time by interrupting Defendant in this exchange:

> MS. EDWARDS: When you put in the complaint, why didn't you complain about the break-ins and all that?

---

2. *See*, *e.g.*, N.C. Gen. Stat. § 8C-1, Rule 611(a) (2019) ("The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment.").

> Why did you not put that in your complaint when you filed it on – [interruption]
>
> THE COURT: I'm going to object to that and sustain it, ma'am. He's already testified that the only reason he thought you had problems was over balls.

¶ 26 Likewise, Defendant's remaining arguments concerning the trial court's tone and treatment of Defendant were comfortably within the discretion of the trial judge. "A presiding judge is given large discretionary power as to the conduct of a trial. Absent controlling statutory provisions or established rules, all matters relating to the orderly conduct of the trial are within his discretion." *State v. Higginbottom*, 312 N.C. 760, 769-70, 324 S.E.2d 834, 841 (1985) (internal citation omitted).

¶ 27 Moreover, even assuming *arguendo* that the trial judge had displayed bias, "[i]n a *non-jury* case where the trial judge develops a bias or prejudice toward one party and where there is no evidence this bias or prejudice arose from any source outside the evidence and arguments presented in the case, the judgment entered by the trial court will be affirmed if it is otherwise properly entered." *Sowers v. Toliver*, 150 N.C. App. 114, 120, 562 S.E.2d 593, 597 (2002) (emphasis added) (Greene, J., concurring). Here, there is likewise no evidence that the trial court's attitude towards Defendant arose from any sort of personal bias, but rather from a disapproval of Defendant's disorganized arguments and mode of presenting evidence. Accordingly, the trial court did not abuse its discretion in its interactions with Defendant during the hearing.

D. Improper Amendment

¶ 28 **[4]** We next address Defendant's argument that the trial court erred by improperly amending the no-contact order. We disagree and hold that the trial court did not abuse its discretion by amending the order.

¶ 29 Here, the trial court issued an amended no-contact order following Defendant's request for a more legible copy of the order. The amended order contained identical content to the original order, with the exception of an additional box checked in the "Order" section: "The defendant cease stalking the plaintiff."

¶ 30 Rule 60(a) of the North Carolina Rules of Civil Procedure permits a judge to *sua sponte* correct clerical mistakes in judgments resulting from an oversight or omission:

> Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight

> or omission may be corrected by the judge at any time on his own initiative or on the motion of any party and after such notice, if any, as the judge orders. During the pendency of an appeal, such mistakes may be so corrected before the appeal is docketed in the appellate division, and thereafter while the appeal is pending may be so corrected with leave of the appellate division.

N.C. Gen. Stat. § 1A-1, Rule 60(a) (2019).

¶ 31 "Relief under Rule 60(a) is limited to the correction of clerical errors, and it does not permit the correction of serious or substantial errors." *In re Estate of Meetze*, 272 N.C. App. 475, 479, 847 S.E.2d 220, 224 (2020) (internal marks and citations omitted). A change in an order is considered substantive and outside the boundaries of Rule 60(a) "when it alters the effect of the original order." *Id.* "A trial court's order correcting a clerical error under Rule 60(a) is subject to the abuse of discretion standard." *Id.*

¶ 32 " 'Clerical mistakes' are typographical errors, mistakes in writing or copying something into the record, or other, similar mistakes that are not changes in the court's reasoning or determination." *In re J.K.P.*, 238 N.C. App. 334, 343, 767 S.E.2d 119, 124 (2014). For example, in *In re J.K.P.*, this Court concluded that "that the term 'clerical mistakes' includes the inadvertent checking of boxes on forms." *Id.* at 343, 767 S.E.2d at 125 (internal marks and citation omitted). In that case, the trial court spoke with the respondent about the risks associated with proceeding *pro se* and asked the respondent to read and sign a waiver-of-counsel form. *Id.* at 343-44, 767 S.E.2d at 124-25. After the respondent signed the form, the court accidentally checked the box labeled "Parent's waiver is not knowing and voluntary." *Id.* The trial court later amended the order *sua sponte* to indicate that the respondent's waiver was indeed knowing and voluntary. *Id.* On appeal, we concluded that the checked box was an inadvertent clerical mistake in light of the trial court's "findings on the form, and its additional, contemporaneous statements at that hearing." *Id.* at 344, 767 S.E.2d at 125.

¶ 33 Here, the issue before us likewise becomes whether the trial court's inclusion of an additional checked box on the amended no-contact order qualified as the amendment of a clerical mistake/omission, or instead was a substantive alteration of the order. We conclude the former characterization is more accurate—that the trial court's amendment qualified as the correction of a simple clerical mistake in failing to check the appropriate box in its first order.

¶ 34 As explained above, Rule 60(a) expressly contemplates the correction of omissions, and a "clerical mistake" can include "the inadvertent checking of boxes on forms." *In re J.K.P.*, 238 N.C. App. at 343, 767 S.E.2d at 125. Based on the trial court's findings and the evidence presented at the hearing, we conclude that the trial court most likely intended to originally check the box ordering that "[t]he defendant cease stalking the plaintiff," and that the omission of the check on this box in the first order was a clerical mistake.

¶ 35 Though the trial court did not make an explicit ruling on stalking, there was evidence before the court that Defendant had engaged in a sustained pattern of harassing and verbally abusing Plaintiff and his family members. During the hearing, the trial court stated to Plaintiff that "I'm certainly not convinced you're breaking into her house" and "I'm going to enter the order." In the written order, the trial court's findings stated:

> The plaintiff has suffered unlawful conduct by the defendant in that: Defendant continuously harasses Plaintiff and Plaintiff's household. Posts letters on Defendant's door with an arrow stating Plaintiff is a "dangerous criminal." In open court Defendant stated "Plaintiff smells" and does so while in her yard at Plaintiff and Plaintiff's family.

¶ 36 These findings align with the definition of "stalking" as provided in the statute governing civil no-contact orders:

> Stalking. - On more than one occasion, following or otherwise harassing, as defined in G.S. 14-277.3A(b)(2), another person without legal purpose with the intent to do any of the following:
>
> a. Place the person in reasonable fear either for the person's safety or the safety of the person's immediate family or close personal associates.
>
> b. Cause that person to suffer substantial emotional distress by placing that person in fear of death, bodily injury, or continued harassment and that in fact causes that person substantial emotional distress.

N.C. Gen. Stat § 50C-1(6) (2019).

¶ 37 In addition, on multiple occasions Defendant used language that could have placed "the [Plaintiff] in reasonable fear either for [his] safety or the safety of [his] immediate family or close personal associates."

Plaintiff's uncontested testimony showed that Defendant sent threatening texts to Plaintiff on multiple occasions that implicated the safety of Plaintiff and his family:

- I hope the next person's house you break into blows your brains out, you stinky criminal.
- I hope someones [sic] blow your brains out. I bet your brains stink.
- I'm hoping someone will kill you, stinky criminal.
- I wish someone would wipe you and your whole family out.
- People like you deserve to die and get off the earth.

¶ 38 Plaintiff's sister-in-law testified that she "[doesn't] feel safe because I don't know if she might have a gun or whatever." Plaintiff's wife testified that "everybody was afraid" at a family gathering due to the actions of Defendant. A finding that Defendant was stalking Plaintiff was thus consistent with the definition found in N.C. Gen. Stat. § 50C-1(6) is supported by the uncontested testimony offered at the hearing.

¶ 39 In Defendant's brief, she cites to *State v. Briggs*, 249 N.C. App. 95, 790 S.E.2d 671 (2016), and *State v. Leaks*, 240 N.C. App. 573, 771 S.E.2d 795 (2015), for the proposition that "decisions should not be changed when the defendant is not present." These criminal cases are inapposite. Those holdings trace back to a longstanding common law right that requires that the accused criminal defendant "be personally present before the court at the time of pronouncing the sentence." *Ball v. United States*, 140 U.S. 118, 131 (1891). This common law right is not applicable in the present civil case.

¶ 40 In sum, we hold that the trial court's findings on the no-contact order and the uncontested testimony reasonably supported a finding of stalking, thus showing that the trial court made an inadvertent "clerical mistake" by *not* checking the box on the first version of the no-contact order. Accordingly, the trial court did not abuse its discretion in correcting this omission in the amended order.

E. Mental Health Evaluation

¶ 41 **[5]** Defendant next argues that the trial court erred by requiring her to obtain a mental health evaluation as part of the no-contact order. In the written order, the trial court checked box seven, entitled "Other: (specify)" and made a handwritten notation ordering that: "Defendant shall

obtain a mental health evaluation. Review hearing on 12/8/20 in 4110 at 9:00am." We disagree with Defendant's argument and hold that the trial court did not abuse its discretion by ordering this evaluation.

¶ 42 To begin with, N.C. Gen. Stat. § 50C-5 grants a trial court considerable discretion in awarding remedies when a no-contact order is issued:

> (a) Upon a finding that the victim has suffered unlawful conduct committed by the respondent, the court may issue temporary or permanent civil no-contact orders as authorized in this Chapter. In determining whether or not to issue a civil no-contact order, the court shall not require physical injury to the victim.
>
> (b) The court may grant one or more of the following forms of relief in its orders under this Chapter:
>
> . . .
>
> (7) Order other relief deemed necessary and appropriate by the court, including assessing attorneys' fees to either party.

N.C. Gen. Stat. § 50C-5(a)-(b) (2019).

¶ 43 Moreover, Chapter 50C is explicit about the non-exclusivity of the remedies laid out in Section 5—"[t]he remedies provided by this Chapter are not exclusive but are additional to other remedies provided under law." *Id.* § 50C-11 (2019).

¶ 44 This Court recently interpreted the limits of the remedies under § 50C-5 in *Russell v. Wofford*, 260 N.C. App. 88, 816 S.E.2d 909 (2018). In that case, the trial court issued a Chapter 50C no-contact order against a defendant who committed acts of nonconsensual sexual conduct against the plaintiff. *Id.* at 89, 816 S.E.2d at 910. Among the listed remedies, the trial court included in its order an "other" remedy requiring the defendant to surrender all firearms to the sheriff's department, revoking his concealed carry permit, and barring all firearm purchases for the duration of the order. *Id.* at 89-90, 816 S.E.2d at 910.

¶ 45 We ultimately reversed that portion of the order, holding that "District Courts do not have . . . unfettered discretion under Chapter 50C to order any relief the judge believes necessary to protect a victim." *Id.* at 94, 816 S.E.2d at 913. Despite the broad language of the statute, we nevertheless determined that ordering a defendant to surrender all firearms was too broad a remedy and was too tenuously connected to the issues raised by the no-contact order. *Id.* Instead, we concluded that

"the catch-all provision [in § 50C-5] limits the court to ordering a party to act or refrain from acting . . . in relationship to [the plaintiff.]" *Id.* at 93-94, 816 S.E.2d at 912-13 (citing *State v. Elder*, 368 N.C. 70, 72-73, 773 S.E.2d 51, 53 (2015)). We also emphasized that a Chapter 50C remedy must not abridge any fundamental rights guaranteed by the federal and state constitutions. *Id.*

¶ 46 We therefore held that requiring the defendant to surrender his firearms, revoking his concealed carry permit, and forbidding the purchase of firearms without statutory notice of those possibilities went beyond "ordering a party to act or refrain from acting in relationship to . . . [the] plaintiff." *Russell*, 260 N.C. App. at 94, 816 S.E.2d at 913 (internal marks and citation omitted).

¶ 47 In contrast, in the present case we do not believe that the single mental health evaluation ordered by the trial court went beyond the limits of § 50C-5 or abridged any of Defendant's fundamental constitutional rights. The remedy ordered by the trial court here was narrowly tailored; was directly related to the issues raised by the no-contact order; did not abridge any constitutional right; and was analogous to other remedies commonly awarded by trial courts in similar civil cases.

¶ 48 For example, the statute governing domestic violence protective orders states that a trial court may "[o]rder any party the court finds is responsible for acts of domestic violence to attend and complete an abuser treatment program if the program is approved by the Domestic Violence Commission." N.C. Gen. Stat. § 50B-3(a)(12) (2019). Abuser treatment programs, also known as "batterer intervention programs," contain elements analogous to a basic "mental health evaluation."[3] This type of mental health program is one among a list of non-exhaustive remedies, comparable to the list in § 50C-5, containing no extra due process requirements. Rather, § 50C-5(b)(7) requires only that the trial court find the measure "necessary and appropriate."

¶ 49 In this regard, the trial court reasonably found the testimony offered at trial alarming enough to order the Defendant to "act in relationship to the Plaintiff" by completing a mental health evaluation, in order to aid Defendant in restoring peaceful relations with her neighbor and in examining her concerning beliefs that Plaintiff was breaking into her home.

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3. *See, e.g.*, *North Carolina Batterer Intervention Programs: A Guide to Achieving Recommended Practices*, N.C. Council for Women (March 2013), https://files.nc.gov/ncdoa/BattererInterventionHandbook.pdf.

¶ 50 Defendant's testimony and written submissions showed that she exhibited a number of concerning, delusional beliefs and behaviors in regards to Plaintiff, such as: (1) Defendant's baseless conviction that Plaintiff was continually breaking into her house, even though her home security system never indicated a break-in; (2) Defendant's belief that Plaintiff was "damaging her [heating] system by putting some type of substance in the pipes in the furnace lines"; (3) Defendant's belief that Plaintiff had "put some type of white powder all over everything in [her] house"; (4) Defendant's belief that Plaintiff was tampering with the food in her fridge; (5) Defendant's continued verbal harassment of Plaintiff and his family; and (6) Defendant's repeated texts containing death threats sent to Plaintiff and his family. Based on this evidence of Defendant's troubling beliefs and behaviors towards Plaintiff, we cannot conclude that the trial court overstepped the bounds of § 50C-5 in ordering Defendant to receive a mental health evaluation as part of the no-contact order. The trial court did not abuse its discretion in ordering the mental health evaluation.

F. Failure to Consider Motion to Dismiss

¶ 51 **[6]** Defendant finally argues that the trial court abused its discretion by not considering the motion to dismiss which she filed prior to the hearing. We disagree and conclude that the trial court did not abuse its discretion by failing to consider Defendant's defective motion.

¶ 52 On 28 July 2020, shortly before the date of the hearing, Defendant filed a motion to dismiss—but did not serve the motion upon Plaintiff. At the hearing, the court stated that the court had not considered the documents in the file:

> MS. EDWARDS: Your Honor, I would like to -- I have a question. Did the documents that I submitted, are they in my file today?
>
> THE COURT: Whether they would be or not, ma'am, you still have to follow the court rules and evidence rules in the courtroom. *I don't look at anything in the file*. I listen to the testimony and that's it. So if you have something you want me to look at, you would have to have them with you today.
>
> MS. EDWARDS: I do.
>
> THE COURT: Okay. Well, then you're going to be able to enter it into evidence later.

MS. EDWARDS: Okay.

THE COURT: When it's your turn.

¶ 53 From the record, it appears that Defendant's "motion to dismiss" was a document appended to her written answer. The answer was filed with Mecklenburg County District Court on 28 July 2020. However, the record contains no indication, nor does Defendant claim, that the motion to dismiss was ever served upon Plaintiff.

¶ 54 Rule 5(a) of the North Carolina Rules of Civil Procedure requires service of process for written motions: "every pleading subsequent to the original complaint . . . [and] every written motion . . . shall be served upon each of the parties." N.C. Gen. Stat. § 1A-1, Rule 5(a) (2019). Written motions must also be filed and served under Rule 5(d): "[t]he following papers shall be filed with the court, either before service or within five days after service: . . . (2) Written motions and all notices of hearing." *Id.*, Rule 5(d). A motion which is not served upon all parties is "procedurally flawed" and need not be considered by the court. *See Cap. Res.*, *LLC v. Chelda*, *Inc.*, 223 N.C. App. 227, 242, 735 S.E.2d 203, 214, n.6 (2012).

¶ 55 Here, because Defendant's motion to dismiss was not properly served, the trial court acted properly in refusing to consider it. Moreover, Defendant was free to make an oral motion to dismiss at the hearing, but failed to do so. *See* N.C. Gen. Stat. § 1A-1, Rule 7(b). The trial court invited Defendant to present her evidence and submissions during the hearing, but Defendant did not bring the matter back up. We accordingly hold that the trial court did not err in refusing to consider Defendant's procedurally defective motion.

III. Conclusion

¶ 56 Because there was no error or abuse of discretion in any of the trial court's rulings, we affirm the no-contact order in all respects.

AFFIRMED.

Judge DILLON concurs.

Judge GRIFFIN concurs in result.

IN RE A.D.

[278 N.C. App. 637, 2021-NCCOA-398]

IN RE A.D. & A.D.

No. COA21-6

Filed 3 August 2021

1. Child Abuse, Dependency, and Neglect—neglect—substantiation—sufficiency of evidence

The trial court did not err in a neglect case where its finding of fact that the department of social services (DSS) had substantiated neglect by respondent was supported by clear and convincing evidence. Although DSS's initial investigation report said, "services needed" for neglect rather than "services substantiated," the evidence—revealing that respondent admittedly used improper physical discipline with the children, refused to attend parenting classes or therapy to address the problem, and failed to seek necessary therapy for the children to address their own mental health issues—showed that the children faced a substantial risk of physical, emotional, and mental harm under respondent's care.

2. Child Abuse, Dependency, and Neglect—neglect—sufficiency of findings—determination of "services needed" rather than "substantiated"

The trial court's findings of fact supported its neglect adjudication, including its finding that the department of social services (DSS) "substantiated" neglect by respondent even though DSS's initial investigation report said, "services needed" rather than "services substantiated." The official policies governing in-home services treat the phrases "services needed" and "services substantiated" similarly, and DSS was not even required to substantiate neglect in order to proceed with the juvenile petition. In fact, N.C.G.S. § 7B-302(c) required DSS to file the petition where DSS properly determined that family services were necessary but where respondent refused to participate in those services, and the evidence of respondent's refusal to engage with her case plan at the time DSS filed the petition supported the court's neglect adjudication.

Appeal by Respondent from order entered 31 August 2020 by Judge Shamieka L. Rhinehart in Durham County District Court. Heard in the Court of Appeals 8 June 2021.

Durham County Government, by Senior Assistant County Attorney Bettyna Belly Abney, for Durham County Department of Social Services, Petitioner-Appellee.

Erica M. Hicks, for the Guardian ad Litem.

Edward Eldred, for Respondent.

WOOD, Judge.

¶ 1 Respondent appeals an order adjudicating the minor children, Alta[1] and Ardith, neglected. On appeal, Respondent alleges the trial court erred because its finding of fact that the Durham County Department of Social Services ("DSS") substantiated neglect was not supported by clear and convincing evidence. Respondent further contends the trial court erred in concluding Alta and Ardith were neglected because this conclusion of law was not supported by its findings of fact. After careful review of the record and applicable law, we affirm the decision of the trial court.

I. Background

¶ 2 In 2012, Respondent was granted custody of Alta, Ardith, and their brother.[2] The children came into Respondent's care because their biological mother, Respondent's sister, struggled with substance abuse. On September 8, 2018, DSS received a report regarding the family, alleging neglect due to improper discipline. Specifically, the report alleged Respondent smacked Alta in the face, resulting in a nosebleed. Respondent admitted she swung at Alta, but claimed she only intended to hit her on the shoulder. Ardith also reported that she was "whooped with a belt" on the back of her legs, resulting in bruising.

¶ 3 In December 2018, DSS closed its investigation, marking the case as "Services Needed" rather than "Substantiated" on its case decision summary. On December 7, 2018, DSS determined services were needed for the family and transferred the case to an in-home services case worker for ongoing case management. At that time, DSS recommended counseling services for Respondent, Alta, and Ardith, and recommended that Respondent participate in parenting classes.

¶ 4 On January 17, 2019, DSS attempted to provide an In-Home Services Agreement (the "Agreement") to Respondent and explain the process for completing the requirements, but Respondent refused to sign

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1. *See* N.C. R. App. P. 42(b) (pseudonyms are used to protect the identity of the juveniles).

2. Alta and Ardith's brother is not subject to this appeal.

the Agreement. The social worker made multiple subsequent visits to Respondent's home, and Respondent continued to refuse to sign the Agreement. The social worker testified that Respondent was angry with the results of DSS's investigation and felt it was unfair.

¶ 5 That same month, Respondent, Alta, and Ardith each completed a comprehensive clinical assessment through Yelverton Enrichment Services ("Yelverton"). According to Ardith's comprehensive clinical assessment, she was distressed over the separation from her biological mother. Ardith was sad, angry, desired to be left alone, and suffered from nightmares. She also displayed troublesome behavior, such as hitting and calling children names at school and hitting and screaming at others two to three times a week at school and once a week at home. According to Alta's comprehensive clinical assessment, Alta expressed that she felt abandoned by her biological mom, experienced sadness, desired to be alone, and had flashbacks of living with her mother. She felt helpless and hopeless because she constantly thought about the past, causing her to be distracted by worry and memories. Alta reported that sometimes she forced herself to eat when she did not feel like eating.

¶ 6 During Respondent's comprehensive clinical assessment, Respondent reported feeling stressed and overwhelmed due to the attention Alta and Ardith required and because she internalized the grief over the passing of her grandmother. The social worker reported Respondent had various emotional outbursts while working with DSS. According to the social worker, Respondent experienced crying spells during their meetings, was verbally aggressive, and yelled at the social worker and her supervisor.

¶ 7 The results of the comprehensive clinical assessments led to Alta and Ardith being diagnosed with adjustment disorder with mixed anxiety and depressed mood. Respondent was diagnosed with major depressive disorder, moderate, single episode, with anxious disorder. Yelverton recommended Respondent, Alta, and Ardith participate in outpatient therapy to address their issues and develop skills to manage their symptoms.

¶ 8 Despite the recommendations she received from Yelverton and DSS, Respondent refused to schedule therapy appointments for herself, Alta, or Ardith. On January 18, 2019, Alta began receiving therapy in her charter school from a Yelverton therapist. Alta met with the Yelverton therapist once a week through the end of the school year in June 2019 but did not receive any further mental health treatment thereafter.

¶ 9 Yelverton was not able to provide services to Ardith because she attended a public school. Respondent was uncomfortable having the therapist meet Ardith in her home and did not allow the therapist to provide

services to Ardith in the residence. Yelverton was unable to schedule appointments on the weekend when Respondent reported she had availability, so Ardith was not able to participate in services.

¶ 10 Respondent attended one therapy session in June 2019 but failed to attend the second scheduled appointment and did not reschedule. The therapist attempted to set up in-home sessions, but Respondent refused to allow the therapist into her home. DSS offered to assist Respondent with transportation to therapy sessions, but Respondent refused. Respondent refused to participate in parenting classes, intensive in-home services, peer support, home and school visits, case management services, and attempted social worker counseling and guidance as recommended by DSS. Respondent prevented the social worker from seeing the children, only allowing access three times during the first four months of in-home services, and once allowing the social worker to see the children through the door.

¶ 11 On July 5, 2019, DSS filed a petition alleging Alta, Ardith, and their younger brother were dependent and neglected juveniles. DSS filed the petition "[d]ue to [Respondent]'s resistance to engage herself or the children in any services." At the time of the filing of the petition, Alta was no longer receiving therapy and neither Respondent nor Ardith received treatment throughout the case.

¶ 12 By the end of 2019, Respondent, Alta, and Ardith were attending individual counseling sessions. This mental health treatment continued until the disposition hearing. However, DSS was unable to follow up on their engagement in therapy because Respondent refused to provide DSS access to their therapy records.

¶ 13 The adjudication hearing was held over four days between February and May 2020. On May 28, 2020, the trial court adjudicated Alta and Ardith neglected due to improper care, supervision, or discipline and living in an environment injurious to their welfare. The trial court proceeded to disposition that same day, but there was insufficient court time for the hearing. Thus, the disposition hearing was rescheduled by the trial court for June 18, 2020. Respondent was ordered to allow DSS to have at least two face-to-face visits with the children before June 17, 2020. Respondent complied with the limited order. However, Respondent continued to be resistant in allowing DSS access to the children twice a month pursuant to North Carolina Department of Health and Human Services ("NC DHHS") In-Home Policies, Protocol, and Guidance for moderate-risk cases.

¶ 14 On August 31, 2020, the trial court entered its written adjudication and disposition order, concluding Alta and Ardith were neglected juveniles because they did not receive proper care, supervision, or discipline from Respondent, and they lived in an environment injurious to their welfare. Respondent retained legal custody of the children subject to a court-ordered protection plan and her compliance with in-home services. On September 17, 2020, Respondent timely filed notice of appeal.

II. Standards of Review

¶ 15 During the adjudication hearing, the trial court must determine whether the conditions alleged in the petition exist. *See In re A.B.*, 179 N.C. App. 605, 609, 635 S.E.2d 11, 14 (2006) (citing *Powers v. Powers*, 130 N.C. App. 37, 46, 502 S.E.2d 398, 403-04 (1998)). Evidence of events after the petition is filed is irrelevant to the determination of whether the child is neglected. *See id.* at 605, 635 S.E.2d at 14-15. The trial court resolves any conflicts in the evidence, acting as "both judge and jury." *In re Oghenekevebe*, 123 N.C. App. 434, 439, 473 S.E.2d 393, 397 (1996) (citation omitted). Accordingly, "appellate courts are bound by the trial courts' findings of fact where there is some evidence to support those findings, even though the evidence might sustain findings to the contrary." *In re Montgomery*, 311 N.C. 101, 110-11, 316 S.E.2d 246, 252-53 (1984) (citation omitted).

¶ 16 Our review of the trial court's adjudication and disposition order "entails a determination of (1) whether the findings of fact are supported by clear and convincing evidence, and (2) whether the legal conclusions are supported by the findings of fact." *In re Gleisner*, 141 N.C. App. 475, 480, 539 S.E.2d 362, 365 (2000) (internal quotation marks and citations omitted). "Clear and convincing evidence is evidence which should fully convince." *In re S.R.J.T.*, ___ N.C. App. ___, 2021-NCCOA-94, ¶ 5 (citation omitted). "[W]hether a trial court's findings of fact support its conclusions of law is reviewed *de novo*." *In re J.S.*, 374 N.C. 811, 814, 845 S.E.2d 66, 71 (2020) (citation omitted).

III. Analysis

¶ 17 Respondent raises two arguments on appeal. Each will be addressed in turn.

A. Finding of Fact No. 24

¶ 18 **[1]** Respondent first contends finding of fact 24 is not supported by competent evidence because DSS failed to substantiate neglect for inappropriate discipline. Respondent argues this finding is not supported

because the initial case decision summary from December 2018 indicated "Services Needed" rather than "Substantiated." Finding of fact 24 states,

> As a result of the CPS investigation . . . [DSS] *substantiated neglect* for inappropriate discipline. [DSS] had concerns regarding the mental health needs of [Alta, Ardith,] and [Respondent]. Later, this matter was transferred to [DSS's] In-Home Services Unit on or about January 17, 2019. (emphasis added).

¶ 19 A neglected juvenile is one "whose parent . . . does not provide proper care, supervision, or discipline; . . . or who lives in an environment injurious to the juvenile's welfare." N.C. Gen. Stat. § 7B-101(15) (2021). To support an adjudication of neglect, there must be evidence of some type of emotional, physical or mental harm, or a substantial risk of such harm, from the neglect; however, there is no requirement that the court make a specific finding where the facts support a finding of harm or substantial risk of harm. *See In re Safriet*, 112 N.C. App. 747, 753, 436 S.E.2d 898, 902 (1993). The trial court is granted "some discretion in determining whether children are at risk for a particular kind of harm given their age and the environment in which they reside." *In re C.M.*, 183 N.C. App. 207, 210, 644 S.E.2d 588, 592 (2007) (internal quotation marks and citation omitted).

¶ 20 In this case, the evidence tended to show that Alta and Ardith were at a substantial risk of harm. *See In re T.R.T.*, 225 N.C. App. 567, 571, 737 S.E.2d 823, 827 (2013). During DSS's investigation into the September 18, 2018 report, Alta told the social worker that Respondent hit her in the face, causing her nose to bleed. The social worker also testified about that same investigation, "I confirmed the allegations and [Ardith] was saying that she had got in trouble and that she had got a spanking during that time and she was hit. And [Ardith] showed me a couple of marks on her." Moreover, Respondent admitted to using physical discipline with the children, further substantiating the allegations of neglect for improper discipline, but failed to attend parenting classes or therapy that could help her address the use of improper discipline.

¶ 21 The evidence also showed the girls were at risk of continued emotional and mental harm. The results of Alta and Ardith's comprehensive clinical assessments and their documented behavioral issues demonstrated they needed mental health treatment for their health and well-being. Specifically, Alta reported feeling hopeless and having difficulty eating, while Ardith stated she was frequently anxious. The

social worker testified to Respondent's "resistance to engage herself or the children in any services" such that at the filing of the petition, Alta was no longer receiving therapy and neither Respondent nor Ardith received treatment throughout the case. Thus, the evidence tends to show Respondent denied the girls necessary treatment for their mental and emotional well-being and refused to attend therapy to address her own mental health issues that contributed to her stress and feelings of frustration regarding the children. This Court has previously upheld a finding of neglect in cases where parents specifically failed to follow through with required therapy for themselves and treatment for their children. *See In re A.J.M.*, 177 N.C. App. 745, 751, 630 S.E.2d 33, 36 (2006); *see also In re Thompson*, 64 N.C. App. 95, 100-01, 306 S.E.2d 792, 795-96 (1983).

¶ 22 Here, Respondent's failure to attend parenting classes and seek mental health treatment for herself and the children demonstrates that she did not address the conditions that led to the filing of the petition and the ultimate adjudication of neglect. *See A.J.M.*, 177 N.C. App. at 751, 630 S.E.2d at 36. "A parent's failure to make progress in completing a case plan is indicative of a likelihood of future neglect." *In re C.M.P.*, 254 N.C. App. 647, 655, 803 S.E.2d 853, 859 (2017) (citation omitted). Respondent's use of improper discipline on Alta and Ardith, and her failure to satisfy DSS's recommendations to address the root cause, resulted in concerns for Alta and Ardith's safety. *See id.* DSS case plans are designed to address the conditions that DSS has identified as endangering the well-being of the children. *See In re Brim*, 139 N.C. App. 733, 742-43, 535 S.E.2d 367, 372 (2000).

¶ 23 This Court has upheld a trial court's finding that a mother's failure to cooperate with DSS put the child at risk of substantial harm where the mother refused to participate in services, including parenting classes and mental health therapy. *In re T.R.T.*, 225 N.C. App. at 572, 737 S.E.2d at 827. Such evidence in light of a prior adjudication of neglect supported the trial court's finding of neglect. *Id.* (citing *In re C.M.*, 183 N.C. App. at 212, 644 S.E.2d at 593). Respondent admitted to hitting Alta and to using physical discipline, including hitting Ardith with a belt and leaving bruises and marks. Thus, Respondent's use of improper discipline and refusal to complete the requirements intended to address this issue supports the trial court's finding of fact.

¶ 24 Respondent further contends finding of fact 24 was not supported by competent evidence because it also states this case was transferred to in-home services "on or about January 17, 2019," instead of on December 7, 2018.

¶ 25 While the North Carolina Child Protective Services ("CPS") Assessment Documentation Tool provided in the record on appeal reveals that DSS transferred this case to in-home services on December 7, 2018, rather than on January 17, 2019, as is stated in finding of fact 24, we do not find that this typographical error undercuts the clear and convincing evidence of the minor children's neglect in this case. Accordingly, we affirm the trial court on this issue.

B. Neglected Conclusion of Law

¶ 26 **[2]** Next, Respondent contends the trial court's conclusion of law that Alta and Ardith were neglected is not supported by the evidence because DSS did not *substantiate* neglect in December 2018; Respondent and the girls received some services for seven months; and there were no new reports of maltreatment between the time of the first allegation and the time of the adjudication hearing.

¶ 27 DSS has the duty to screen reports of suspected child abuse, neglect, or dependency to determine whether the facts reported, if true, meet the statutory definitions of abuse, neglect, or dependency. N.C. Gen. Stat. § 7B-302 (2021); N.C. Gen. Stat. § 7B-403 (2021). If they do, DSS must determine what type of assessment response is appropriate. N.C. Gen. Stat. § 7B-302(a). A "family assessment" response is used for reports meeting the statutory definitions of neglect and dependency and applies a family-centered approach that focuses on the strengths and needs of the family as well as the child's alleged condition. N.C. Gen Stat. § 7B-101(11b) (2021). At the end of an assessment, DSS determines or substantiates whether abuse, neglect, serious neglect, or dependency occurred. If DSS substantiates a report or determines that the family needs services, DSS must provide protective services and *may* file a petition with or without requesting a nonsecure custody order removing the child from the home immediately. N.C. Gen. Stat. § 7B-302(c)-(d); N.C. Gen. Stat. § 108A-14(a)(11) (2021).

¶ 28 After substantiation or a finding that a family requires services, DSS is responsible for determining what services would help the family to meet the child's basic needs, keep the child safe, and prevent future harm. DSS must determine and arrange for the most appropriate services, focusing on the child's safety. If a parent, guardian, custodian, or caretaker refuses to accept the protective services arranged or provided by DSS, then DSS is *required* to file a petition to protect the juvenile(s). N.C. Gen. Stat. § 7B-302(c).

¶ 29 In this case, Respondent improperly assumes that DSS can only proceed with filing a juvenile petition if there is a case decision of

substantiation, not merely services needed. A determination of substantiated and services needed are treated similarly under DSS policy. We note the policies and protocols that guide and govern in-home services, "In-Home Services Policy, Protocol and Guidance," (IHS Policy), are found in North Carolina's Child Welfare Manual published by the North Carolina Department of Health and Human Services. CPS In-Home Services are legally mandated for a substantiation of neglect *or determination of services needed. See* N.C. Dep't of Health & Hum. Servs., *In-Home Services Policy*, *Protocol*, *and Guidance*, 1, 3 (May 2020), https://policies.ncdhhs.gov/divisional/social-services/child-welfare/policy-manuals/in-home_manual.pdf. Further, throughout the IHS Policy, the two terms are used in this manner, and various measures are required following a substantiation and a determination that services are needed. *Id*. at 1, 3-4. Thus, "Services Needed" is not the same as "unsubstantiated."

¶ 30 Here, DSS made a case decision of "Services Needed" based on Respondent's use of improper discipline and the mental health needs of the family. DSS's determination was supported by Alta's descriptions of Respondent leaving marks on her legs from being whipped with a belt several times and Respondent yelling when the children did something wrong. Further, Ardith reported to the social worker that Respondent sometimes smacked the children on the back of their heads, on their legs, and on the sides of their faces with her hand. Such allegations were confirmed by Respondent who admitted she used such physical discipline with the children at the time.

¶ 31 Although Respondent was willing to engage the children and herself in mental health treatment while DSS was investigating the report, there is sufficient evidence in this case to support the girls were neglected at the time of the filing of DSS's petition. Respondent's refusal to follow the recommendations from Yelverton's comprehensive clinical assessments, refusal to complete any parenting programs, and failure to comply with in-home services is sufficient evidence to support a finding of neglect. Respondent testified she failed to seek outpatient therapy for herself and the girls before the petition was filed or the adjudication hearing. Where parents or caretakers did not cooperate with DSS or ensure their children received proper treatment, this Court has upheld the trial court's finding of neglect. *See In re T.R.T.*, 225 N.C. App. at 571, 737 S.E.2d at 827 (upholding a trial court's finding that a mother's failure to cooperate with DSS put her child at risk of substantial harm where the mother refused to participate in parenting classes and mental health therapy); *In re C.M.*, 183 N.C. App. at 212, 644 S.E.2d at 593 (holding that the findings relating to the prior adjudication of neglect, subsequent

termination of parental rights as to another child, and the parents' failure to attend mental health treatment and vocational rehabilitation supported the finding that their child was neglected); *In re Thompson*, 64 N.C. App. at 101, 306 S.E.2d at 795-96 (holding that the mother's failure to seek treatment for her daughter to determine if she was developing normally supported the conclusion of neglect by failure to provide necessary medical care); *In re Huber*, 57 N.C. App. 453, 458, 291 S.E.2d 916, 919 (1982) (affirmed the finding of neglect where the mother failed to ensure her child received the necessary medical and remedial care she needed, reasoning that "[to] deprive a child of the opportunity for normal growth and development is perhaps the greatest neglect a parent can impose upon a child"). Thus, based on the evidence and consistent with our precedent, we hold the trial court's conclusion that Alta and Ardith were neglected juveniles is supported by its findings of fact.

¶ 32 We note that "erroneous findings unnecessary to the determination [of neglect] do not constitute reversible error where an adjudication is supported by sufficient additional findings grounded in clear and convincing evidence." *In re C.B.*, 245 N.C. App. 197, 199, 783 S.E.2d 206, 208-09 (2016) (internal quotation marks omitted) (quoting *In re T.M.*, 180 N.C. App. 539, 547, 638 S.E.2d 236, 240 (2006)). Here, the trial court's typographical error in using the phrase "substantiated neglect" instead of "services needed" in finding of fact 24 has no practical effect on the determination that Alta and Ardith were neglected juveniles. Our review revealed the two phrases are treated similarly under DSS policy and that DSS was required under N.C. Gen. Stat. § 7B-302(c) to file a petition after determining the family needed services and Respondent refused to accept or participate in those services. N.C. Gen. Stat. § 7B-302(c).

IV. Conclusion

¶ 33 Therefore, we hold there was sufficient and clear and convincing evidence the children were neglected at the time of the filing of the petition. Accordingly, we affirm the trial court's adjudication and disposition order.

AFFIRMED.

Chief Judge STROUD and Judge COLLINS concur.

MUNOZ V. MUNOZ

[278 N.C. App. 647, 2021-NCCOA-399]

ISSAC MUNOZ, Plaintiff
v.
CASSANDRA MUNOZ, Defendant

No. COA20-193

Filed 3 August 2021

1. Child Custody and Support—primary physical custody—relocation out-of-state—best interest factors

The trial court did not abuse its discretion either by determining that a child's relocation to another state with her father was in her best interests or in setting the physical custody schedule, where the court's findings reflected its consideration of multiple factors affecting the child's welfare and best interests—including the relative strength of each parent's support system in their respective states of residence—and were supported by competent evidence.

2. Child Custody and Support—primary physical custody—mother's military service—not sole basis for best interest determination

There was no abuse of discretion by the trial court in granting primary physical custody of a child to her father where the court's consideration of the mother's military service, rather than violating N.C.G.S. § 50-13.2(f) (a provision that provides protection for military members in custody matters), was only one of several bases for determining the child's best interests, and was outweighed by the court's evaluation of the relative strength of each party's support system.

Appeal by defendant from order entered 20 August 2019 by Judge Edward A. Pone in Cumberland County District Court. Heard in the Court of Appeals 10 June 2021.

Ward and Smith, P.A., by Christopher S. Edwards and Alex C. Dale, for plaintiff-appellee.

Smith Debnam Narron Drake Saintsing & Myers, L.L.P., by Alicia Jurney, for defendant-appellant.

ZACHARY, Judge.

¶ 1 Defendant-Mother Cassandra Munoz appeals from a permanent custody order awarding Plaintiff-Father Issac Munoz primary physical custody of their daughter, M.M.[1] After careful review, we affirm.

Background

¶ 2 Mother and Father grew up in California and were "high[-]school sweethearts," with Father graduating in 2010 and Mother graduating in 2012. They also married in 2012, and M.M. was born to the young couple in 2015. Mother was, and remains, a member of the United States Army. In 2016, the Army stationed Mother at Fort Bragg near Fayetteville, North Carolina, where she worked as a test measurement and diagnostic equipment maintenance support specialist.

¶ 3 When M.M. was born, both parents worked, but they preferred not to leave M.M. in daycare, so they relied on extended family to provide care for M.M. Father's grandmother lived with them and cared for M.M. before and after the family moved to Fayetteville following Mother's assignment to Fort Bragg. Mother's father has also lived with the family and taken care of M.M. For most of M.M.'s life, Mother and Father have had live-in family support to care for her.

¶ 4 While living in Fayetteville in 2018, Mother and Father separated. At that time, Mother was anticipating deployment to Iraq for nine months.

¶ 5 On 16 April 2018, Father filed a complaint in Cumberland County District Court seeking divorce from bed and board, child custody, child support, and equitable distribution. On 19 April 2018, Father obtained an *ex parte* order restraining Mother from contacting him and awarding Father temporary custody of M.M., as well as exclusive use and possession of the marital residence. On 25 April 2018, Mother filed an emergency motion to set aside the *ex parte* order. The trial court heard the matter that day, and on 3 May 2018, the court entered an order allowing both parties to occupy the marital residence pending further proceedings.

¶ 6 On 30 April 2018, Mother filed her answer and counterclaims for child custody, child support, and equitable distribution. On 10 May 2018, the parties executed a Memorandum of Judgment regarding temporary child custody, which the trial court entered on 27 June 2018 ("the temporary custody order"). Pursuant to the temporary custody order, the parties agreed that it was in M.M.'s best interest for them to share joint legal custody, with Father having primary physical custody and Mother having secondary physical custody. The parties also agreed to permit Father to relocate to California with M.M.

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1. Initials are used to protect the identity of the minor child.

¶ 7 On 15 May 2018, Mother filed a motion to amend the temporary custody order, which came on for hearing on 14 June 2018. That same day, Mother filed a motion to review the temporary custody order, in that her deployment had been delayed until July. On 29 June 2018, the trial court entered an order requiring the parties to keep M.M. in North Carolina until Mother deployed, but no later than 1 July 2018.

¶ 8 On 12 July 2018, Mother filed a motion to set aside the temporary custody order, alleging that, *inter alia*, she had been "informed that she [would] no longer [be] deployed." Father and M.M. had already relocated to Victorville, California, where Father was employed as a supervisor for UPS.

¶ 9 Mother's motion to set aside the temporary custody order came on for hearing on 8 October 2018, and on 15 November 2018, the trial court entered its order establishing a holiday visitation schedule and once again awarding primary physical custody to Father and secondary physical custody to Mother. On 29 November 2018, the parties executed a second Memorandum of Judgment, which the trial court entered on 30 November 2018, modifying the holiday visitation schedule set forth in the trial court's order; a formal typed order was entered on 7 January 2019.

¶ 10 On 19 August 2019, the permanent custody matter came on for hearing in Cumberland County District Court before the Honorable Edward A. Pone. The next day, the trial court entered a permanent custody order awarding primary physical custody to Father and secondary physical custody to Mother. On 11 September 2019, Mother timely filed her notice of appeal.

Discussion

¶ 11 On appeal, Mother argues that the trial court abused its discretion by (1) allowing Father to relocate to California with M.M. without considering the factors set forth in *Ramirez-Barker v. Barker*, 107 N.C. App. 71, 418 S.E.2d 675 (1992), *disapproved of on other grounds by Pulliam v. Smith*, 348 N.C. 616, 501 S.E.2d 898 (1998); and (2) improperly considering her military-service obligations as the basis for determining that it was in M.M.'s best interest for Father to be awarded primary physical custody, in violation of N.C. Gen. Stat. § 50-13.2(f) (2019).

I. Standard of Review

¶ 12 When this Court reviews a child custody order,

> the trial court's findings of fact are conclusive on appeal if supported by substantial evidence, even if

> there is sufficient evidence to support contrary findings. Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. Unchallenged findings of fact are binding on appeal. The trial court's conclusions of law must be supported by adequate findings of fact. Absent an abuse of discretion, the trial court's decision in matters of child custody should not be upset on appeal.

Jonna v. Yaramada, 273 N.C. App. 93, 116, 848 S.E.2d 33, 51 (2020) (citation omitted). "Questions of statutory interpretation are questions of law," which this Court reviews de novo. *In re J.K.*, 253 N.C. App. 57, 60, 799 S.E.2d 439, 441 (2017) (citation omitted).

II. Ramirez-Barker *Factors*

¶ 13 **[1]** Mother first argues that the trial court abused its discretion by failing to give appropriate consideration to the *Ramirez-Barker* factors in determining whether relocation to California was in M.M.'s best interest. We disagree.

¶ 14 In *Ramirez-Barker*, this Court discussed the factors relevant to a trial court's evaluation of a child's best interest in a case involving the child's potential relocation.

> In exercising its discretion in determining the best interest of the child in a relocation case, factors appropriately considered by the trial court include but are not limited to: the advantages of the relocation in terms of its capacity to improve the life of the child; the motives of the custodial parent in seeking the move; the likelihood that the custodial parent will comply with visitation orders when he or she is no longer subject to the jurisdiction of the courts of North Carolina; the integrity of the noncustodial parent in resisting the relocation; and the likelihood that a realistic visitation schedule can be arranged which will preserve and foster the parental relationship with the noncustodial parent.

107 N.C. App. at 79–80, 418 S.E.2d at 680.

¶ 15 However, the *Ramirez-Barker* factors are not a mandatory checklist for trial courts; as always, the primary objective is the determination of the best interest of the child. Trial courts considering this issue

are not required "to make explicit findings addressing each and every *Ramirez-Barker* factor." *Tuel v. Tuel*, 270 N.C. App. 629, 632, 840 S.E.2d 917, 920 (2020). "[A]lthough the trial court may appropriately consider these factors, the court's primary concern is the furtherance of the welfare and best interests of the child and [her] placement in the home environment that will be most conducive to the full development of [her] physical, mental and moral faculties." *Id.* at 632–33, 840 S.E.2d at 920 (citation omitted). "All other factors," including the visitation rights of the non-relocating parent, "will be deferred or subordinated to these considerations, and if the child's welfare and best interests will be better promoted by granting permission to remove the child from the [s]tate, the court should not hesitate to do so." *Id.* at 633, 840 S.E.2d at 920 (citation omitted).

¶ 16 Mother compares this case to *Evans v. Evans*, in which "the trial court found . . . that the proposed relocation would adversely affect the relationship between the father and his child[,]" but "made no other findings about the effect of the proposed relocation on the child." 138 N.C. App. 135, 142, 530 S.E.2d 576, 580 (2000). We vacated and remanded the child custody order in that case because the trial court "fail[ed] to find facts so that this Court [could] determine that the order [wa]s adequately supported by competent evidence and the welfare of the child [wa]s subserved[.]" *Id.*

¶ 17 Mother argues that, like the trial court in *Evans*, the court here "failed to make required findings showing that it had given appropriate consideration to the relevant factors in determining whether [M.M.]'s relocation . . . was in her best interests." Particularly, Mother maintains that the trial court did not consider "the advantages and disadvantages of the proposed relocation" for M.M., nor did it consider or make findings of fact regarding Mother's relationship with M.M. However, careful review of the permanent custody order in this case reflects that the trial court made the requisite findings, and did not abuse its discretion.

¶ 18 First, we note that Mother only challenges two of the trial court's findings of fact:

> 39. [Mother] does not have a support system in close proximity to her and [M.M.] She is here alone.
>
> . . . .
>
> 46. [Mother] remains in the military. She is here in the Fayetteville area all alone. While she has relatives in North Carolina, the closest ones are three to four

> hours away. They are not available at a moment's notice as it would take them several hours to get here.

¶ 19 Mother maintains that, "[w]hile it is true that [her] family members do not live in Fayetteville, it is inaccurate to say that she does not have a support system and that she is alone." Mother misstates the trial court's findings of fact with respect to her support system. Rather than finding that "she does not have a support system" *at all*, the trial court merely found that she does not have a support system "in close proximity to her and [M.M.]" Indeed, the trial court found that M.M. "is fortunate to have such a great supportive family system on both her mother's and father's side of the family."

¶ 20 Neither does Mother challenge the trial court's finding of fact that she "remains here in Fayetteville/Ft. Bragg. Her closest relatives are three to four hours away in Ash[e]ville, North Carolina. She currently lives alone in the marital residence with the family dog." In this, the trial court accurately summarized Mother's testimony from the permanent custody hearing. The trial court's unchallenged findings of fact are supported by competent evidence and binding on appeal, *Jonna*, 273 N.C. App. at 116, 848 S.E.2d at 51, and support those findings that Mother challenges. Mother's challenge to these findings of fact misinterprets the trial court's order and is overruled.

¶ 21 Throughout its findings of fact, the trial court focused a great deal on each parent's support systems in their respective home states. As the trial court explained, after M.M. was born both parents "soon realized they needed help with the minor child and did not want to put her in daycare. They were both young parents and had never had children before." The trial court found that Father's grandmother "has been an integral part of [M.M.]'s life since shortly after her birth" and was a "live-in care provider" for much of the first two years of her life. The trial court also found that Mother's father came to assist the parents for approximately one year. After reciting this history, the trial court summarized its view of the parents' need for a support system in raising M.M.: "The truth is, they have never parented [M.M.] completely on their own, either together or alone. They have always had family support. And, [M.M.] is fortunate to have such a great supportive family system on both her mother's and father's side of the family."

¶ 22 The trial court then surveyed each of the parents' current support systems in their respective states of residence. The court noted that Father lives in California with his grandmother and uncle; that his grandmother is once again a live-in care provider; and that M.M.'s bedroom

has an extra bed so that Father's grandmother can sleep in M.M.'s room "if she needs to." By comparison, the trial court found that Mother lives alone in a home where M.M. has her own bedroom, but that her "closest relatives are three to four hours away[.]"

¶ 23 This case resembles *Tuel* in that the support system of each parent was similarly a significant factor for the trial court in that case. 270 N.C. App. at 633–34, 840 S.E.2d at 921. Unlike *Tuel*, however, in which the trial court failed to "engage in any comparison" between each parent's home state, "or provide any explanation as to why Indiana would otherwise provide the children with a more enriching environment" than North Carolina, *id.* at 633, 840 S.E.2d at 921, the trial court in the instant case did provide such an explanation.

¶ 24 The trial court found as fact that Father's grandmother "once again is the live-in care provider[,] allowing [F]ather to work and keeping [M.M.] out of daycare and at home with a very familiar relative." The court further found that Father's grandmother "is healthy and able to care for" M.M., who is attending pre-kindergarten, swimming, and taekwondo classes in California. Father also located an elementary school for M.M. within walking distance of their home. Additionally, the trial court found that M.M. "has medical and dental providers there and is doing well in [F]ather's care."

¶ 25 In contrast, the trial court found that although Mother "is a good mother and loves her daughter very much[,]" because Mother does not have a similar familial support system nearby, M.M. "would be in daycare at least eleven hours a day during the week while in [M]other's care[.]" The trial court concluded by contrasting Mother's support system—with her closest relatives "three to four hours away" and "not available at a moment's notice"—against Father's support system, including his grandmother who "is one of the constants in [M.M.]'s life" and "is available for any and all emergencies" that may arise. These findings all reflect the trial court's comparison of each parent's home state and explanation that living with Father in California would provide M.M. "with a more enriching environment." *Id.*

¶ 26 The trial court clearly considered each parent to be a loving and appropriate custodial parent for M.M. It appears that the trial court determined that Father's more immediately proximate support system was a significant factor in deciding that M.M.'s "welfare and best interests w[ould] be better promoted" by permitting her to relocate from the state. *Id.* at 633, 840 S.E.2d at 920 (citation omitted). Given *Tuel*'s reminder that the *Ramirez-Barker* factors are not a mandatory checklist

for a trial court, but rather guideposts for determining a minor child's best interest—which is the true priority in any child custody proceeding—we cannot say that the trial court abused its discretion here. *See Jonna*, 273 N.C. App. at 116, 848 S.E.2d at 51.

¶ 27 Mother also argues that the "trial court's findings of fact do not support its decision regarding the physical custody schedule" established in the permanent custody order. However, Mother does not cite any case law or statutory authority in support of her contention that the trial court abused its discretion in setting that schedule.

¶ 28 Rather, Mother asserts that at the permanent custody hearing, the trial court "refused to grant" her more than a week with M.M. before school started, despite her "begg[ing] for more time because she had not seen her daughter in six months." Mother testified at the hearing that she had 40 days of leave saved. However, Mother's argument on appeal fails to acknowledge that, at the hearing, she initially requested "at least" one week with M.M., which the trial court awarded her, before she asked for more. After the trial court explained that a week was "what [she] asked for," Mother agreed.

¶ 29 Upon careful review of the record, and the arguments presented on appeal, we cannot say that Mother has shown that the trial court abused its discretion on this issue.

III. N.C. Gen. Stat. § 50-13.2(f)

¶ 30 **[2]** Mother also asserts that the trial court abused its discretion by considering her military service as the basis for determining that Father should be granted primary physical custody of M.M., in violation of N.C. Gen. Stat. § 50-13.2(f). This argument lacks merit.

¶ 31 Section 50-13.2(f) provides special protection for members of the armed services in custody matters:

> In a proceeding for custody of a minor child of a service member, a court may not consider a parent's past deployment or possible future deployment as the only basis in determining the best interest of the child. The court may consider any significant impact on the best interest of the child regarding the parent's past or possible future deployment.

N.C. Gen. Stat. § 50-13.2(f).

¶ 32 "The primary rule of construction of a statute is to ascertain the intent of the legislature and to carry out such intention to the fullest

extent." *Dickson v. Rucho*, 366 N.C. 332, 339, 737 S.E.2d 362, 368 (2013) (citation omitted). "When the language of a statute is clear and unambiguous, there is no room for judicial construction, and the courts must give it its plain and definite meaning." *Rosero v. Blake*, 357 N.C. 193, 206–07, 581 S.E.2d 41, 49 (2003).

¶ 33 Although Mother claims that § 50-13.2(f) prohibits the use of her possible future deployment "as a basis" for determining whether the proposed relocation was in M.M.'s best interest, the plain text of the statute belies her argument: "a court may not consider a parent's . . . possible future deployment as the *only* basis in determining the best interest of the child." N.C. Gen. Stat. § 50-13.2(f) (emphasis added). Section 50-13.2(f) thus clearly contemplates a trial court's consideration of a parent's "possible future deployment" as one basis among others in determining a child's best interest—so long as it is not the *only* basis. *Id.*

¶ 34 In the present case, it is evident that Mother's possible future deployment played a role in the procedural posture leading up to the permanent custody order from which Mother appeals. Mother's possible future deployment was certainly a factor in the parties' decision-making, until Mother was informed that she would not be deployed.

¶ 35 It is less clear, however, that Mother's possible future deployment played a significant role in the trial court's determination that relocation was in M.M.'s best interest. Mother calls our attention to several references in the trial court's order to her military service, but most of these merely provide context for the parties' relationship and the procedural history of the case. The trial court's unchallenged findings of fact state that Mother "was and remains a member of the United States Army"; that Mother enlisted when she was 17 years old; that Mother "was scheduled to deploy at the time of the filing of the action"; that although "she ultimately did not deploy, she remains in the Army and is subject to deployment or reassignment at any time"; and that "Mother is in good standing with the military and plans to remain in at this time."

¶ 36 Only one of these findings references Mother's possible future deployment, and the extent to which that possibility affected the trial court's determination—if at all—is unclear. Considering the trial court's predominant focus on the parents' respective support systems, as previously discussed, we are satisfied that Mother's possible future deployment was not "the only basis in determining the best interest" of M.M. *Id.* Mother's argument is overruled.

Conclusion

¶ 37 For the foregoing reasons, the trial court did not abuse its discretion in determining that relocation to California was in M.M.'s best interest, nor did it violate N.C. Gen. Stat. § 50-13.2(f) in its order. The permanent custody order is affirmed.

AFFIRMED.

Judges DIETZ and WOOD concur.

LAURI A. NIELSON (FKA SCHMOKE), PLAINTIFF
v.
RAYMOND SCHMOKE, DEFENDANT

No. COA20-701

Filed 3 August 2021

1. Appeal and Error—interlocutory order—order allowing enforcement of foreign judgment

In an action to enforce a foreign divorce judgment, the trial court's order denying defendant's motion to abate post-judgment proceedings—upon the court's determination that the judgments entered in another state remained enforceable in North Carolina—was immediately reviewable where the order essentially resolved all issues before it. Even if the order was in the nature of a discovery order and therefore interlocutory, it affected a substantial right—by potentially subjecting defendant to execution on his property or sanctions—which would be lost absent immediate appeal permitting review.

2. Enforcement of Judgments—foreign judgments—enforcement period—ten-year period accrued on date of filing in North Carolina

Where plaintiff filed her Michigan divorce judgments in North Carolina in accordance with this state's version of the Uniform Enforcement of Foreign Judgments Act, the filing in effect created a new North Carolina judgment subject to the applicable statutes of limitation in this state. Since the ten-year period of enforcement (for money judgments, N.C.G.S. § 1-234), which accrued upon the filing of the judgments in North Carolina, had not yet expired, the trial

court correctly determined that the Michigan judgments remained enforceable in North Carolina. Therefore, there was no error in the denial of defendant's motion to abate post-judgment proceedings or in the order directing defendant to respond to discovery requests.

Appeal by Defendant from Order entered 18 March 2020 by Judge George F. Jones in New Hanover County Superior Court. Heard in the Court of Appeals 12 May 2021.

Butler & Butler, L.L.P., by Hunter E. Fritz, for plaintiff-appellee.

Kerner Law Firm, PLLC, by Thomas W. Kerner, for defendant-appellant.

HAMPSON, Judge.

Factual and Procedural Background

¶ 1 Raymond Schmoke (Defendant) appeals from an Order entered 18 March 2020 concluding judgments originally entered in a Michigan Court on 29 December 2003 and 12 October 2009, and filed as foreign judgments in North Carolina on 28 June 2013, remained enforceable in North Carolina under North Carolina's 10-year statutory enforcement period for judgments. Specifically, the trial court's Order denied Defendant's Motion to Abate Post-Judgment Proceedings and required Defendant and his current spouse to respond to discovery in supplemental proceedings, including production of documents and other information requested under N.C. Gen. Stat. § 1-352.2. The Record tends to reflect the following:

¶ 2 On 29 December 2003, the Circuit Court for Manistee County, Michigan (Michigan Court) entered a judgment (Michigan Divorce Judgment) in favor of Lauri Nielson (Plaintiff) against Defendant, her ex-husband. On 12 October 2009, the Michigan Court entered an additional judgment in favor of Plaintiff (Supplemental Judgment).

¶ 3 On 28 June 2013, pursuant to North Carolina's version of the Uniform Enforcement of Foreign Judgments Act (UEFJA) contained in N.C. Gen. Stat. § 1C-1701 *et seq.* (2019), Plaintiff enrolled the Michigan Divorce Judgment and Supplemental Judgment (collectively, the Foreign Judgments), and commenced the current action through a Notice of Filing and by filing the Foreign Judgments in North Carolina with the New Hanover County Clerk of Superior Court. Consistent with N.C. Gen. Stat. § 1C-1703, Plaintiff filed the Foreign Judgments with a

supporting affidavit averring the Foreign Judgments were final judgments and were, at the time, unsatisfied in the amount of $1,323,096.31. Consistent with N.C. Gen. Stat. § 1C-1704, Plaintiff served a Notice of Filing on Defendant along with copies of the Foreign Judgments and supporting affidavit.

¶ 4 On 29 July 2013, Defendant filed a Motion to Strike Affidavit and Notice of Defenses to Enforcement of Foreign Judgments pursuant to N.C. Gen. Stat. § 1C-1705. Defendant subsequently filed a Notice of Additional Defenses on 11 March 2014, along with a Motion to Strike Plaintiff's Amended Affidavit.

¶ 5 On 12 August 2015, the trial court entered a Judgment (North Carolina Judgment) concluding Plaintiff had met all the requirements under the UEFJA and the Foreign Judgments were entitled to Full Faith and Credit in North Carolina. The trial court entered the Judgment in favor of Plaintiff in the amount of $1,323,096.31 plus interest from and after 23 August 2013.

¶ 6 After an unsuccessful attempt to enforce the Judgment by way of Writ of Execution, Plaintiff began supplemental proceedings by conducting an oral examination of Defendant under N.C. Gen. Stat. § 1-352. Following this oral examination, on 2 October 2019, Plaintiff filed and served two separate Motions seeking Defendant and his current spouse to "Produce Documents and Information" pursuant to N.C. Gen. Stat. § 1-352.2. Both Motions were heard ex parte by the Clerk of Court, and on 3 and 9 October 2019 respectively, the Clerk of Court entered orders granting these Motions (collectively, Discovery Orders).

¶ 7 On 29 October 2019, Defendant filed a Motion to Set Aside the Order of the Clerk of Court ordering him to provide discovery in supplemental proceedings. Subsequently, on 19 December 2019, Defendant filed a Motion to Abate Post-Judgment Proceedings on the basis the Foreign Judgments were no longer enforceable in North Carolina. During a 9 January 2020 hearing before the trial court on these Motions, Defendant argued all post-judgment enforcement efforts, including supplemental proceedings, should abate because the statutory 10-year period for enforcing a judgment in North Carolina had expired. Specifically, Defendant contended because the Supplemental Judgment had been entered by the Michigan Court in October 2009, at the latest, the enforcement period of the Foreign Judgments had expired in October 2019, and, thus, the North Carolina Judgment was also now unenforceable.

¶ 8 In its Order entered 18 March 2020, the trial court "[wa]s persuaded by the logic of *Wells Fargo Equip. Fin., Inc. v. Asterbadi*, 841 F.3d

237 (4th Cir. 2016) (applying 28 U.S.C. § 1963) and h[e]ld[] that the Enforcement Period started to run on the date the Foreign Judgments were filed with the Clerk of Court: June 28, 2013." The trial court also determined the Foreign Judgments "were entitled to Full Faith and Credit in the State of North Carolina." The trial court subsequently concluded: "[t]he Enforcement Period to enforce the North Carolina Judgment ha[d] not expired" and "[t]he Enforcement Period to enforce the Foreign Judgments ha[d] not expired." Accordingly, the trial court ordered: "Defendant's Motion to Abate Post-Judgment Proceedings is respectfully DENIED[.]" The trial court also denied Defendant's Motion to Set Aside the Clerk's Order requiring discovery responses and ordered Defendant and his current spouse to "provide to counsel for the Plaintiff the documents and information set forth" in the Discovery Orders entered by the Clerk of Court "within ten (10) days following the entry of this Order." Defendant filed written Notice of Appeal on 17 April 2020.

Appellate Jurisdiction

¶ 9 **[1]** As an initial matter, Plaintiff characterizes the trial court's 18 March 2020 Order denying Defendant's Motion to Abate Post-Judgment Proceedings and requiring Defendant and his spouse to respond to discovery in post-judgment supplemental proceedings as a "Discovery Order[,]" which is interlocutory and not immediately appealable. For his part, Defendant contends the trial court's 18 March 2020 Order constitutes an appealable final order, or, in the alternative—if it does constitute an interlocutory order—it is one that, in effect, determines the action and prevents a judgment from which an appeal might be taken or otherwise affects a substantial right under N.C. Gen. Stat. § 7A-27(b).

¶ 10 "Interlocutory orders and judgments are those made during the pendency of an action which do not dispose of the case, but instead leave it for further action by the trial court to settle and determine the entire controversy." *Sharpe v. Worland*, 351 N.C. 159, 161, 522 S.E.2d 577, 578 (1999) (quotation marks and citations omitted). "Generally, there is no right of immediate appeal from interlocutory orders and judgments." *Id.* (citations omitted). "The purpose of this rule is to prevent fragmentary and premature appeals that unnecessarily delay the administration of justice and to ensure that the trial divisions fully and finally dispose of the case before an appeal can be heard." *Id.* at 161, S.E.2d at 578-79 (quotation marks and citations omitted).

¶ 11 Here, fundamentally, the trial court's 18 March 2020 Order resolves all issues before it on the basis the statutory 10-year period to enforce the Foreign Judgments in North Carolina had not expired, resulting in

a Judgment enforceable through execution and supplemental proceedings. Thus, the trial court's Order is certainly in the nature of a final Order or Judgment from which appeal may be taken. *See Veazey v. City of Durham*, 231 N.C. 357, 361-62, 57 S.E.2d 377, 381 (1950) ("A final judgment is one which disposes of the cause as to all the parties, leaving nothing to be judicially determined between them in the trial court." (citations omitted)).

¶ 12 Moreover, presuming the trial court's Order is interlocutory—to the extent it may be interpreted as compelling discovery in supplemental proceedings without imposing a sanction for failure to comply—we agree with Defendant the trial court's Order is one affecting a substantial right which would be lost absent immediate appeal permitting review under N.C. Gen. Stat. § 7A-27(b)(2)(a); that is, absent an immediate appeal, Defendant may be subject to enforcement proceedings, including execution on his property or the imposition of sanctions on a Judgment that may not otherwise be enforceable. This is exactly what application of the 10-year enforcement period is designed to prevent. Indeed, it is unclear how, absent this immediate appeal, Defendant would ever be able to seek direct appellate review of the trial court's decision.[1] Consequently, for purposes of this appeal, we conclude Defendant has established his right to appeal the trial court's Order and, in turn, his appeal is timely and properly before us.

Issue

¶ 13 The dispositive issue on appeal is whether the trial court properly concluded the 10-year period for enforcement of Plaintiff's Foreign Judgments in North Carolina accrued on the date the Foreign Judgments were filed in North Carolina on 28 June 2013 and, thus, had not expired as of 18 March 2020.

Analysis

¶ 14 **[2]** The trial court determined as a matter of law, the 10-year period to enforce the Foreign Judgments in North Carolina began to accrue upon the filing of the Foreign Judgments in North Carolina, consistent with the UEFJA. We apply a de novo review to issues of law. *Falk Integrated Techs., Inc. v. Stack*, 132 N.C. App. 807, 809, 513 S.E.2d 572, 574 (1999); *see also Goetz v. N.C. Dep't of Health & Hum. Servs.*, 203 N.C. App. 421, 425, 692 S.E.2d 395, 398 (2010) ("Where there is no dispute over the relevant facts, a lower court's interpretation of a statute of

1. Acknowledging Defendant might also have sought a form of discretionary review through a Petition for Writ of Certiorari filed under N.C. R. App. P. 21.

limitations is a conclusion of law that is reviewed *de novo* on appeal." (citation omitted)).

¶ 15 As a general proposition, by application of statute, a money judgment remains enforceable in North Carolina for a period of 10 years from the entry of the judgment. *See* N.C. Gen. Stat. § 1-234 (2019) (governing docketing of judgments and providing: "[t]he judgment is a lien on the real property in the county where the same is docketed . . . for 10 years from the date of entry of the judgment under G.S. 1A-1, Rule 58, in the county where the judgment was originally entered."); N.C. Gen. Stat. § 1-306 (2019) (governing enforcement "as of course" of judgments and providing in part: "[h]owever, no execution upon any judgment which requires the payment of money may be issued at any time after ten years from the date of the entry thereof . . . ."); *see also* N.C. Gen. Stat. § 1-47(1) (10-year statute of limitations to bring an action "[u]pon a judgment or decree of any court of the United States or of any state or territory thereof . . . .").

¶ 16 Here, Defendant contends the Foreign Judgments—and, thus, the subsequent North Carolina Judgment entered acknowledging the validity of those Foreign Judgments and rejecting Defendant's alleged defenses—can no longer be enforced in North Carolina because the 10-year enforcement period lapsed, at the latest, on 13 October 2019, 10 years after the entry of the Supplemental Judgment in Michigan. On the other hand, Plaintiff contends the filing of the Foreign Judgments in North Carolina consistent with the UEFJA effectively results, for enforcement purposes, in a new judgment in North Carolina that is enforceable for 10 years from its enrollment in North Carolina, which occurred in this case on 28 June 2013. The trial court agreed with Plaintiff and was persuaded by the logic of the U.S. Court of Appeals for the Fourth Circuit's (Fourth Circuit) decision in *Asterbadi*. In turn, we agree with the trial court that *Asterbadi* is persuasive and instructive to the analysis.

¶ 17 In *Asterbadi*, the Fourth Circuit "address[ed] the enforceability of a judgment originally entered in the Eastern District of Virginia but registered for enforcement in the District of Maryland under 28 U.S.C. § 1963[,]" which governs registration of judgments from other federal districts. *Asterbadi*, 841 F.3d at 239. "Particularly," the Fourth Circuit "consider[ed] the time period during which the judgment remain[ed] enforceable in Maryland." *Id.* The Fourth Circuit explained the factual background of the case:

> Collecting on a financing debt incurred by Dr. Nabil J. Asterbadi, CIT/Equipment Financing, Inc. ("CIT") obtained a $2.63 million judgment against

> Asterbadi in 1993, in the Eastern District of Virginia. Under Virginia law, that judgment remained viable for 20 years. Roughly 10 years after the judgment had been entered, on August 27, 2003, CIT registered the judgment in the District of Maryland pursuant to § 1963. Under Maryland law, made relevant by Federal Rule of Civil Procedure 69(a), judgments expire 12 years after entry.
>
> CIT sold the judgment to Wells Fargo Equipment Finance, Inc., and Wells Fargo thereafter, in April 2015, began collection efforts in Maryland. Asterbadi filed a motion for a protective order, contending that the judgment was unenforceable because the efforts began more than 12 years after the judgment had originally been entered in Virginia. Wells Fargo responded that the registration of the Virginia judgment in Maryland before it had expired under Virginia law became, in effect, a new judgment that was subject to Maryland law for enforcement. Thus, it argued, Maryland's 12-year limitations period began on the date that the judgment was registered in Maryland, not on the date that the original judgment was entered in Virginia, and therefore the judgment was still enforceable.
>
> The district court agreed with Wells Fargo, concluding that the time limitation for enforcement of the judgment began with the date of its registration in Maryland, on August 27, 2003, and that therefore it was still enforceable against Asterbadi.

Id. at 239-40.

¶ 18 Under 28 U.S.C. § 1963:

> A judgment in an action for the recovery of money . . . entered in any . . . district court . . . may be registered by filing a certified copy of the judgment in any other district . . . . A judgment so registered shall have the same effect as a judgment of the district court of the district where registered and may be enforced in like manner.

28 U.S.C. § 1963 (2019). The Fourth Circuit observed 28 U.S.C. § 1963 "was enacted . . . as a device to streamline the more awkward prior

practice of bringing suit on a foreign judgment and thereby obtaining new judgment on the foreign judgment." *Asterbadi*, 841 F.3d at 244. The Fourth Circuit reasoned:

> Thus, instead of requiring the holder of a Virginia judgment to file a complaint in the Maryland district court on the basis of the Virginia judgment, thereby engaging the federal process to obtain a new judgment enforceable in the District of Maryland, § 1963 allows the judgment holder simply to register the Virginia judgment in Maryland but to retain the benefits of obtaining a judgment under the former practice of suing on a judgment to obtain a new judgment.

Id. The Fourth Circuit found support for this reasoning in the statutory language itself: "[i]ndeed, § 1963 explicitly so provides, stating that a district court judgment registered in another district court 'shall have *the same effect as a judgment* of the district court . . . and *may be enforced in like manne*r.' " *Id.* (second alteration in original) (quoting 28 U.S.C. § 1963). The Court in *Asterbadi* "thus construe[d] § 1963 to provide for a *new* judgment in the district court where the judgment is registered, as if the new judgment had been *entered* in the district" and "[a]ccordingly, just as a new judgment obtained in an action on a previous judgment from another district would be enforceable as any judgment entered in the district court, so too is a registered judgment." *Id.*

¶ 19 The Fourth Circuit further noted:

> [i]f registration were merely a ministerial act to enforce the Virginia judgment in Maryland, there would be no need for the statute to have added the language that the registered judgment functions the same as a judgment entered in the registration court. With that language, § 1963 elevates the registered Virginia judgment to the status of a new Maryland judgment, and it is accordingly enforced as a new judgment entered in the first instance in Maryland.

Id. at 245.

¶ 20 "With this understanding of § 1963," the Fourth Circuit "appl[ied] the principles applicable to any money judgment entered in a district court." *Id.* "Under [Fed. R. Civ. P.] 69(a), the judgment [wa]s enforceable in accordance with state law, and in this case Maryland law provide[d]

that 'a money judgment expires 12 years from the date of entry or most recent renewal.' " *Id.* "Accordingly, the registered judgment in this case would have expired 12 years from August 27, 2003, or on August 27, 2015. And because Wells Fargo renewed the judgment for another 12 years on August 26, 2015, the registered judgment remain[ed] enforceable in Maryland to August 26, 2027." *Id.*

¶ 21 Similar to 28 U.S.C. § 1963, the UEFJA governs the filing and enforcement of foreign judgments in North Carolina. *See* N.C. Gen. Stat. §§ 1C-1701 to -1708 (2019). "The UEFJA enacted in North Carolina sets out the procedure for filing a foreign judgment." *DOCRX, Inc. v. EMI Servs. of N.C., LLC*, 367 N.C. 371, 378, 758 S.E.2d 390, 395 (2014) (citations omitted). Similar to 28 U.S.C. § 1963, the UEFJA also serves the purpose of providing a more streamlined option for registering a foreign judgment, rather than requiring a judgment creditor to have to bring a suit on the foreign judgment in North Carolina. Indeed, as our Supreme Court noted in DOCRX, the Prefatory Note to the 1964 Revised Uniform Enforcement of Foreign Judgments Act, states the revised UEFJA:

> adopts the practice which, in substance, is used in Federal courts. It provides the enacting state with a speedy and economical method of doing that which it is required to do by the Constitution of the United States. It also relieves creditors and debtors of the additional cost and harassment of further litigation which would otherwise be incident to the enforcement of the foreign judgment.

Id. at 380, 758 S.E.2d at 396 (quoting Rev. Unif. Enforcement of Foreign Judgments Act prefatory note (1964), 13 U.L.A. 156-57 (2002)); *see also* N.C. Gen. Stat. § 1C-1707 (2019) ("This Article may not be construed to impair a judgment creditor's right to bring a civil action in this State to enforce such creditor's judgment."). Moreover, like 28 U.S.C. § 1963, N.C. Gen. Stat. § 1C-1703 expressly provides a judgment filed in accordance with the UEFJA "has the same effect . . . as a judgment of this State and shall be enforced or satisfied in like manner[.]" N.C. Gen. Stat. § 1C-1703(a).

¶ 22 Given the similarities between 28 U.S.C. § 1963 and North Carolina's UEFJA, the analysis employed by the Fourth Circuit in *Asterbadi* is highly persuasive and equally employable to this case. *Asterbadi*'s persuasiveness here is further underscored by decisions of other state courts interpreting their own foreign judgment registration statutes. *See, e.g., Stevenson v. Edgefield Holdings, LLC*, 244 Md. App. 604, 225 A.3d 85,

99 (2020) ("Ultimately, we determine that *Asterbadi* should guide our interpretation of the effective date of foreign judgments. In other words, registration of a judgment within a jurisdiction gives rise to enforcement within that jurisdiction."); *Singh v. Sidana*, 387 N.J. Super. 380, 385, 904 A.2d 721, 724 (App. Div. 2006) ("The focus of this provision is manifestly on the commencement of the action to enforce the foreign judgment, not on the foreign judgment's continuing validity whenever such questions as may be raised are addressed. As long as a judgment is viable and enforceable in the rendering state when domestication proceedings are commenced, that judgment becomes enforceable, by the terms of New Jersey law, at that moment."); *Canizaro Trigiani Architects v. Crowe*, 815 So.2d 386, 392 (La. App. 2 Cir. 2002) ("Therefore, the procedure for enforcement of a foreign judgment under the EFJA results in a new Louisiana judgment just as it would if the procedure under La. C.C.P. art. 2541 were followed."); *Pan Energy v. Martin*, 813 P.2d 1142, 1144 (Utah 1991) ("[A]t least for purposes of enforcement, the filing of a foreign judgment . . . creates a new Utah judgment which is governed by the Utah statute of limitations . . . . [F]oreign judgments filed in Utah must also be governed by the eight-year statute of limitations, which runs from the date of filing."); *see also Home Port Rentals, Inc. v. Int'l Yachting Grp., Inc.*, 252 F.3d 399, 407 (5th Cir. 2001) (under 28 U.S.C. § 1963 "when a money judgment (1) is rendered in a federal district court located in one state, and (2) is duly registered in a district court located in another state, (3) at a time when enforcement of that judgment is not time-barred in either state, the applicable limitation law for purposes of enforcement of the registered judgment in the registration district is that of the registration state—here, Louisiana's 10-year liberative prescription—and it starts to run on the date of registration." (emphasis omitted)); *Stanford v. Utley*, 341 F.2d 265, 268 (8th Cir. 1965) ("[Section] 1963 is more than 'ministerial' and is more than a mere procedural device for the collection of the foreign judgment. We feel that registration provides, so far as enforcement is concerned, the equivalent of a new judgment of the registration court.").

¶ 23 For his part, Defendant contends we need not look to other jurisdictions for guidance and, instead, points to North Carolina authorities which stand for the proposition that in order for a foreign judgment to be enforceable in North Carolina, it must be filed under the UEFJA or a separate civil action filed to enforce it within 10 years from its entry in the foreign jurisdiction under the statute of limitations found in N.C. Gen. Stat. § 1-47. *See, e.g.*, *Arrington v. Arrington*, 127 N.C. 190, 37 S.E.2d 212 (1900); *Palm Coast Recovery Corp. v. Moore*, 184 N.C. App. 550, 646 S.E.2d 438 (2007); *Elliot v. Estate of Elliot*, 163 N.C. App. 577,

596 S.E.2d 819 (2004); *Wener v. Perrone & Cramer Realty, Inc.*, 137 N.C. App. 362, 528 S.E.2d 65 (2000). However, our decision here is unrelated to efforts to register foreign judgments in North Carolina more than 10 years after their entry and has no bearing on the impact of the general rule applied in those cases. This is because, here, the initial Michigan Divorce Judgment was entered on 29 December 2003 and the Foreign Judgments were filed on 28 June 2013, and were, thus, filed within the 10-year Statute of Limitations mandated by N.C. Gen. Stat. § 1-47. As such, these cases are inapplicable to the particular issue at bar.

¶ 24 Applying the reasoning of *Asterbadi*—and the related cases—to North Carolina's UEFJA, when a foreign money judgment is filed in North Carolina in compliance with N.C. Gen. Stat. §§ 1C-1703 and 1C-1704, such filing has the effect of creating a new North Carolina judgment, which "shall be enforced or satisfied in like manner[.]" N.C. Gen. Stat. § 1C-1703(c) (2019). This includes the 10-year enforcement period contemplated in N.C. Gen. Stat. §§ 1-234 and 1-306, as well as the running of any statute of limitations to enforce the "new" North Carolina judgment under N.C. Gen. Stat. § 1-47, which each begin to run upon the filing of the foreign judgment in North Carolina.

¶ 25 Thus, here, the trial court properly concluded the enforcement period in North Carolina began to run on 28 June 2013, the day the Foreign Judgments were properly filed in North Carolina. As the Foreign Judgments remained enforceable in North Carolina, the trial court also did not err by requiring Defendant and his current spouse to respond to the discovery requests in supplemental proceedings under N.C. Gen. Stat. § 1-352 *et seq.* Consequently, the trial court correctly denied Defendant's Motion to Abate Post-Judgment Proceedings and did not err in ordering Defendant and his current spouse to "provide to counsel for the Plaintiff the documents and information set forth" in the Discovery Orders entered by the Clerk of Court.

Conclusion

¶ 26 Accordingly for the foregoing reasons, the trial court's 18 March 2020 Order is affirmed.

AFFIRMED.

Judges TYSON and WOOD concur.

PUTNAM v. PUTNAM

[278 N.C. App. 667, 2021-NCCOA-401]

MICHAEL PUTNAM, Plaintiff
v.
REBECCA PUTNAM, Defendant

No. COA20-594

Filed 3 August 2021

1. Divorce—alimony—reasonable monthly expenses—consideration of relevant factors

The trial court properly considered the parties' standard of living during their marriage when it calculated the wife's reasonable monthly expenses in its order awarding her alimony (reducing the monthly expenses from the $18,275 estimated in the wife's financial affidavit down to $13,677), as shown by the trial court's detailed findings of facts concerning all relevant factors.

2. Divorce—alimony—amount—statutory factors

The trial court did not abuse its discretion in awarding a wife the amount of $2,100 per month in alimony where the trial court considered all relevant and required statutory factors under N.C.G.S. § 50-16.3A(b), including marital misconduct, relative earnings and earning capacities, ages and conditions of the spouses, duration of the marriage, standard of living established during the marriage, relative education, relative assets and liabilities, contribution as homemaker, relative needs, and the equitable distribution of the property.

Appeal by Defendant from order entered 11 February 2020 by Judge Christine Walczyk in Wake County District Court. Heard in the Court of Appeals 25 May 2021.

Marshall & Taylor, PLLC, by Travis R. Taylor for plaintiff-appellee.

Gailor Hunt Davis Taylor & Gibbs, PLLC, by Jonathan S. Melton and Carrie B. Tortora for defendant-appellant.

MURPHY, Judge.

¶ 1 Decisions regarding the determination and amount of alimony are left to the sound discretion of the trial court. A trial court does not abuse its discretion when it considers all relevant factors under N.C.G.S. § 50-16.3A(b) for which evidence is offered. Here, the Record reflects the trial court considered all relevant factors under N.C.G.S. § 50-16.3A(b),

including the parties' standard of living during the marriage, and did not abuse its discretion in determining the dependent spouse is entitled to $2,100.00 per month in alimony.

BACKGROUND

¶ 2 Plaintiff Michael Putnam ("Michael") and Defendant Rebecca Putnam ("Rebecca") were married on 16 June 2001. On 2 March 2017, Michael and Rebecca separated, and on 27 July 2018, they divorced. Michael and Rebecca are the parents of three minor children.

¶ 3 After the parties separated, they resolved equitable distribution by entering into a consent order, filed 21 May 2018, regarding the distribution of their property. As a result of the consent order, Michael was awarded Sequence, Inc. ("Sequence"), a validation specialist company Michael and Rebecca formed in 2002, in which Rebecca had been a 51% shareholder and Michael had been a 49% shareholder. According to the terms of the consent order, Michael became the 100% shareholder in Sequence. Rebecca received a distributive award of approximately $3,000,000.00 in exchange for Michael retaining Sequence, as well as a payout of $225,000.00 in exchange for Michael retaining the parties' beach house purchased during the marriage. The consent order did not resolve the issue of alimony.

¶ 4 On 11 February 2020, after an alimony trial, the trial court entered its *Order on Alimony, Temporary Child Support and Attorney's Fees* ("Alimony Order"). The Alimony Order designated Michael as the supporting spouse and Rebecca as the dependent spouse, and ordered Michael to pay Rebecca $2,100.00 per month in alimony, $1,900.00 per month in temporary child support, and $72,617.00 in support arrears at the rate of $1,500.00 per month. Rebecca timely appeals, arguing the trial court erred in its computation and award of alimony.[1]

ANALYSIS

¶ 5 Rebecca argues the Alimony Order should be vacated "as to the amount of [her] reasonable monthly needs and remand[ed] for entry of

1. In accordance with N.C.G.S. § 50-16.3A(a), "[t]he [trial] court shall award alimony to the dependent spouse upon a finding that one spouse is a dependent spouse, that the other spouse is a supporting spouse, and that an award of alimony is equitable after considering all relevant factors, including those" listed in N.C.G.S. § 50-16.3A(b). N.C.G.S. § 50-16.3A(a) (2019). Rebecca does not argue the trial court erred in finding Michael to be a supporting spouse and finding her to be a dependent spouse. Rather, Rebecca argues the trial court's procedure in computing her alimony award was error and challenges the amount of her alimony award.

a new order." Rebecca also argues "the trial court abused its discretion in the amount of alimony awarded to [her]."

¶ 6 "Decisions regarding the amount of alimony are left to the sound discretion of the trial judge and will not be disturbed on appeal unless there has been a manifest abuse of that discretion." *Bookholt v. Bookholt*, 136 N.C. App. 247, 249-50, 523 S.E.2d 729, 731 (1999), *superseded on other grounds by statute as stated in Williamson v. Williamson*, 142 N.C. App. 702, 543 S.E.2d 897 (2001). Our review of the trial court's findings of fact is limited to "whether there is competent evidence to support the findings of fact and whether the findings support the conclusions of law." *Hartsell v. Hartsell*, 99 N.C. App. 380, 385, 393 S.E.2d 570, 573 (1990), *aff'd*, 328 N.C. 729, 403 S.E.2d 307 (1991).

A. Reasonable Monthly Expenses

¶ 7 **[1]** In her most updated amended financial affidavit, dated 10 June 2019, Rebecca listed her total monthly expenses, including the children's expenses, as $18,275.71. The trial court concluded that some of these expenses were unreasonable, and without making any further findings of fact, reduced this number by approximately $4,600.00, finding "[Rebecca's] reasonable monthly expenses, *given the standard of living during the marriage of the parties*, are $13,677.56. This includes the children's monthly expenses." (Emphasis added).

¶ 8 N.C.G.S. § 50-16.3A(b) permits the trial court to exercise its discretion in determining the amount of alimony and directs the trial court to "consider all relevant factors" when making the determination of alimony, including "[t]he standard of living of the spouses established during the marriage[.]" N.C.G.S. § 50-16.3A(b)(8) (2019). Our Supreme Court has defined the phrase "standard of living" as used in N.C.G.S. § 50-16.3A(b)(8) as follows:

> The . . . phrase clearly means more than a level of mere economic survival. Plainly, in our view, it contemplates the economic standard established by the marital partnership for the family unit during the years the marital contract was intact. It anticipates that alimony, to the extent it can possibly do so, shall sustain that standard of living for the dependent spouse to which the parties together became accustomed.

Williams v. Williams, 299 N.C. 174, 181, 261 S.E.2d 849, 855 (1980).

¶ 9 Rebecca argues "the trial court failed to consider the parties' standard of living established during the marriage in determining [her]

reasonable monthly expenses" as required by N.C.G.S. § 50-16.3A(b)(8). Specifically, Rebecca challenges a portion of Finding of Fact 57 that states the trial court relied on "the standard of living during the marriage of the parties" in calculating her reasonable monthly expenses.

¶ 10 There are numerous findings of fact in the Record that show the trial court considered the parties' standard of living during their marriage, including the following:

> 17. *During the marriage of the parties*, [Rebecca] was the primary caretaker for the minor children. Except as a substitute teacher on occasion at her children's school, Envision Science Academy, [Rebecca] did not work outside the home after the birth of the first child.
>
> 18. After the parties' separation, in October 2017 [Rebecca] began working as a preschool teacher at Good Shephard Lutheran Church. [Rebecca] typically works Tuesday through Friday from 9:30 a.m. until 1:30 p.m. This allows her to be home with the children after school.
>
> 19. [Rebecca] is currently only working part-time. If [Rebecca] were to work a full-time job, she would require childcare assistance before and after school.
>
> . . . .
>
> 23. After the parties separated, they reached an agreement regarding the distribution of their property in May 2018. As a result of this Consent Order, [Michael] was awarded the Sequence business, and [Rebecca] received approximately $3,000,000[.00] which she was able to invest. She also received a payout of $225,000[.00] for the Beach House, which house was kept by [Michael].
>
> 24. The parties sold their marital residence and [Rebecca] received approximately $300,000[.00] from the proceeds.
>
> 25. [Rebecca] prepared and submitted a Financial Affidavit. The affidavit was completed in June 2019.
>
> . . . .

49. On her Financial Affidavit, [Rebecca] reported regular recurring monthly expenses of $16,164.09 at the time the parties separated. She reported current (as of June 2019) regular recurring monthly expenses of $10,036.66 but [Rebecca] testified that her current expenses are $10,222.73 as of the date of this hearing.

50. [Rebecca] also listed on her Financial Affidavit additional individual monthly expenses of $10,005.38 at the date of separation. She listed her current (as of June 2019) individual expenses as $9,198.31. [Rebecca] testified at this hearing that her individual monthly expenses had been reduced to $8,052.98.

. . . .

52. In July 2018, [Rebecca] bought a 2[,]500 square foot townhome on Fawn Lake Drive. She used $395,000[.00] to purchase this townhome and did so without a mortgage. This home was in the same district as her children's schools.

53. Just prior to this trial, in July 2019, [Rebecca] bought a new 4[,]200 square foot home for approximately $720,000[.00]. This home is in a gated community near the former marital residence and is in the same school district as the parties' minor children's schools. [Rebecca] put no money down and secured an equity line to finance the home, using her investment account as collateral. Her monthly payment is $3,131[.00] per month. This mortgage payment amount does not include monthly homeowner's association dues ($83.00), utilities, yard maintenance ($225[.00]) property taxes ($524.66), and insurance costs ($243.00) associated with the property.

. . . .

55. [Rebecca] purchased a 2019 GMC Yukon in October 2018 and [Rebecca's] automobile loan payment is $1,184[.00] per month. [Rebecca] listed $376[.00] per month for auto repairs and maintenance relating to her new vehicle.

. . . .

58. [Rebecca] will have an average monthly shortfall of $2,930.00 per month without any consideration for taxes. This is based on income in the amount of $10,746.58 per month and expenses of $13,677.56 per month.

. . . .

62. *During their marriage*, the parties owned a business, Sequence, [] a validation specialist company which assists pharmaceutical companies in testing equipment. [Michael] began the company in 2002. [Rebecca] was a 51% owner of the company. She assisted with bookkeeping and performed other tasks for the business until 2016.

63. *During their marriage*, the parties used income from Sequence[] to pay personal expenses, such as automobile loan payments and insurance. *The parties were able to live an extravagant lifestyle during their marriage*. They vacationed frequently and owned a nice home.

. . . .

66. Some of [Michael's] personal expenses, such as his Ford Expedition, his car insurance and his cell phone are paid by Sequence[].

. . . .

71. After the parties' separation, [Michael] lived briefly with his sister, and then rented an apartment. In April 2018, [Michael] purchased a home on Rosalee [sic] Street in Raleigh, North Carolina where he currently resides.

72. [Michael] completed and served a Financial Affidavit in June 2019 and said Affidavit was admitted at trial.

73. Sequence[] currently pays for [Michael's] health and dental insurance. [Michael] pays for the children's medical, dental, and vision insurance at a cost of $398[.00] per month.

74. On his Financial Affidavit, [Michael] listed regular recurring monthly expenses as of the date of

> separation in the amount of $16,353[.00]. In addition to his loan repayment and his court-ordered support payment, he listed his current (as of June 2019) regular monthly expenses in the amount of $13,219[.00].
>
> 75. [Michael] reported $12,842[.00] per month in individual monthly expenses at the time of separation and [Michael] reported current (as of June 2019) individual expenses in the amount of $14,197[.00] per month (note: the totals were lower on [Michael's] Financial Affidavit, but these are accurate calculations).

(Emphases added).

¶ 11 Finding of Fact 63 states "[t]he parties were able to live an extravagant lifestyle during their marriage." This finding of fact is unchallenged by Rebecca.[2] The remainder of the findings of fact listed above discuss how Rebecca was able to stay home with the children during the marriage, the types of cars the parties purchased during the marriage, and the size of the houses the parties lived in during the marriage. The trial court also made findings of fact about how Rebecca will continue to stay at home with the children, maintain the same kinds of cars, and live in houses of a similar size, as during the marriage. The trial court properly considered the parties' standard of living during their marriage when it calculated Rebecca's reasonable monthly expenses. *See Barrett v. Barrett*, 140 N.C. App. 369, 372, 536 S.E.2d 642, 645 (2000) (holding the trial court considered the parties' marital standard of living when it "made explicit findings as to the parties' respective incomes during the marriage, the type of home in which they lived, and the types of family vacations they enjoyed"); *see also Adams v. Adams*, 92 N.C. App. 274, 279-80, 374 S.E.2d 450, 453 (1988) ("The [trial] judge's findings as to [the defendant's] monthly gross income and his reasonable living expenses, coupled with the findings as to [the plaintiff's] monthly income and her expenses during the last year of the marriage, satisfied the requirement . . . for findings regarding the [parties'] accustomed standard of living [during the marriage]."), *superseded on other grounds by statute as stated in Brannock v. Brannock*, 135 N.C. App. 635, 523 S.E.2d 110 (1999).

¶ 12 Rebecca also notes that Michael was continuing to save and invest for retirement and contends the parties had a pattern of saving during the

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2. As Rebecca does not challenge this finding of fact, it is binding on appeal. *See Juhnn v. Juhnn*, 242 N.C. App. 58, 63, 775 S.E.2d 310, 313 (2015) ("[W]here a trial court's findings of fact are not challenged on appeal, they are deemed to be supported by competent evidence and are binding on appeal.").

marriage. Michael's financial affidavit shows he was investing $1,590.00 per month during the marriage and he was investing $1,661.00 per month at the time of trial. Rebecca was unemployed after the children were born, so her accumulation of retirement assets during the marriage was based solely on Michael's contributions. Rebecca argues "although the trial court made an evidentiary finding regarding [Michael's] saving for retirement, the [trial] court made no ultimate finding regarding [a] pattern of savings as part of the accustomed standard of living for purposes of alimony." We disagree.

¶ 13 "Where the parties have established a pattern of saving for retirement as part of their accustomed standard of living during the marriage, this expense can be part of the standard of living and should be considered for purposes of alimony." *Myers v. Myers*, 269 N.C. App. 237, 262, 837 S.E.2d 443, 460 (2020). "[A]lthough the parties' pattern of savings may not be determinative of a claim for alimony, the trial court must at least consider this pattern in determining the parties' accustomed standard of living." *Vadala v. Vadala*, 145 N.C. App. 478, 481, 550 S.E.2d 536, 539 (2001).

¶ 14 The trial court properly considered the parties' pattern of saving as part of their accustomed standard of living during the marriage, as illustrated in unchallenged Findings of Fact 23, 28, 29, 30, and 42. Those findings of fact state:

> 23. After the parties separated, they reached an agreement regarding the distribution of their property in May 2018. As a result of this Consent Order, [Michael] was awarded the Sequence business, and [Rebecca] received approximately $3,000,000[.00] which she was able to invest. She also received a payout of $225,000[.00] for the Beach House, which house was kept by [Michael].
>
> . . . .
>
> 28. Johnathan Henry is a wealth advisor with the Trust Company of the South. He has been assisting [Rebecca] with her investments since June 2018 when she initially deposited the funds from her distributive award.
>
> 29. Mr. Henry helped [Rebecca] invest her portfolio with a "balanced growth" approach. [Rebecca] currently has an investment portfolio consisting of

> approximately seventy percent (70%) stocks and thirty percent (30%) bonds. . . .
>
> 30. In June 2019, [Rebecca's] investment account held $2,506,847.63. [Rebecca] earned $26,914.81 in dividends and interest between January and June 2019. Her capital appreciation was $175,595.20. [Rebecca] paid $9,772.32 in fees and took $188,420[.00] in distributions. She also deposited $202,532.60 during the same period.
>
> . . . .
>
> 42. The [trial] [c]ourt finds that [Rebecca] can safely withdraw $10,000[.00] per month from the proceeds of her investment account without depleting her estate.

The trial court determined Rebecca has the ability to save for retirement to the same standard that the parties planned for during the marriage by using her investment account. Rebecca does not contest these findings of fact. The trial court properly considered the parties' pattern of savings and retirement contributions as it pertains to the parties' accustomed standard of living.

¶ 15 In further arguing the trial court did not properly consider her reasonable monthly expenses, Rebecca challenges Finding of Fact 56, arguing it is insufficient because it is "vague and does not enable this Court to determine which expenses the trial court reduced."

¶ 16 Finding of Fact 56 states:

> 56. [Rebecca] included some expenses on her affidavit which she testified she is no longer paying, such as storage unit fees, social memberships, and a life coach. She also listed expenses that she did not include in her total such as charitable giving. [Rebecca] listed other expenses that were not reasonable given the standard of living during the marriage, such as the eating out expenses which increased after separation, or were non-recurring.

¶ 17 The amount the trial court found as Rebecca's reasonable monthly expenses, $13,677.56, differed from the amount Rebecca listed as current monthly expenses as of the date of trial in her amended financial affidavit, $18,275.71. However, "[t]he determination of what constitutes the reasonable needs and expenses of a party in an alimony action is

within the discretion of the trial [court], and [it] is not required to accept at face value the assertion of living expenses offered by the litigants themselves." *Bookholt*, 136 N.C. App. at 250, 523 S.E.2d at 731. "Implicit in this is the idea that the trial judge may resort to his own common sense and every-day experiences in calculating the reasonable needs and expenses of the parties." *Cunningham v. Cunningham*, 171 N.C. App. 550, 564, 615 S.E.2d 675, 685 (2005). "The [trial] court is not required to make findings about the weight and credibility which it gives to the evidence before it." *Robinson v. Robinson*, 210 N.C. App. 319, 327, 707 S.E.2d 785, 791 (2011).

¶ 18 Rebecca suggests the trial court must produce a redline itemization for all reasonable or unreasonable expenses listed on a financial affidavit. This is not what is required of the trial court. In *Bookholt*, we reviewed a defendant's claim that the trial court erred in calculating the monthly needs and expenses of each party:

> In his financial affidavit submitted to the trial court, [the] defendant listed $2[,]100[.00] in projected monthly housing costs to enable him to attain better housing. The trial court, however, considered these projections speculative and reduced this figure to $960.50 in finding [the] defendant's total monthly needs and expenses to be $2[,]823.35. [The] [d]efendant maintains that this amounted to an abuse of the trial judge's discretion. We disagree. . . . Here, the trial court apparently felt the $2[,]100[.00] in projected housing costs was unreasonable and then reduced that figure to an amount it felt was more reasonable. By doing so, we find no abuse in the exercise of its discretion.
>
> [The] [d]efendant also claims error in the trial court's calculations as to [the] plaintiff's needs and expenses. In her financial affidavit, [the] plaintiff listed her expenses as $1[,]941.71 per month. The trial judge concluded that five of these expenses were unreasonable and, *without making any further findings*, reduced [the] plaintiff's figure by $625.49. [The] [d]efendant argues that, even though the trial court's reduction ultimately benefitted him, the trial court's calculations are "patently defective" absent appropriate findings to explain them. Again we disagree. As previously stated, the trial judge is

> not bound by the financial assertions of the parties and may resort to common sense and every-day experiences. By reducing some of [the] plaintiff's expenses here, the trial court did not abuse its discretion.

Bookholt, 136 N.C. App. at 250-51, 523 S.E.2d at 731-32 (emphasis added).

¶ 19 Here, as in *Bookholt*, the trial court provided sufficient detail for us to determine it had considered all relevant factors when calculating Rebecca's reasonable monthly needs and expenses. The trial court did not abuse its discretion in reducing Rebecca's monthly expenses and provided sufficient findings of fact for us to review on appeal.

B. Amount of Alimony Award

¶ 20 **[2]** Rebecca's second argument pertains to the amount of alimony she was awarded. Rebecca does not take issue with the trial court's finding she is entitled to alimony, but rather takes issue with the *amount* the trial court awarded her in alimony, arguing "the trial court abused its discretion in the amount of alimony awarded to [her]."

¶ 21 "Decisions concerning the amount . . . of alimony are entrusted to the trial court's discretion and will not be disturbed absent a showing that the trial court has abused such discretion." *Robinson*, 210 N.C. App. at 326, 707 S.E.2d at 791; *see also Dodson v. Dodson*, 190 N.C. App. 412, 415, 660 S.E.2d 93, 96 (2008); *Walker v. Walker*, 143 N.C. App. 414, 422, 546 S.E.2d 625, 630 (2001). "The [trial] court is not required to make findings about the weight and credibility which it gives to the evidence before it." *Robinson*, 210 N.C. App. at 327, 707 S.E.2d at 791.

¶ 22 The trial court concluded "[Michael] is a supporting spouse and [Rebecca] is a dependent spouse within the meaning of [N.C.G.S.] § 50-16A." After making that determination, the trial court was required to "consider all relevant factors" in determining the amount and duration of alimony. N.C.G.S. § 50-16.3A(b) (2019). N.C.G.S. § 50-16.3A(b) enumerates sixteen relevant, but non-exclusive factors, including:

> (1) The marital misconduct of either of the spouses. . . .;
>
> (2) The relative earnings and earning capacities of the spouses;
>
> (3) The ages and the physical, mental, and emotional conditions of the spouses;
>
> (4) The amount and sources of earned and unearned income of both spouses, including, but not limited

> to, earnings, dividends, and benefits such as medical, retirement, insurance, social security, or others;
>
> (5) The duration of the marriage;
>
> (6) The contribution by one spouse to the education, training, or increased earning power of the other spouse;
>
> (7) The extent to which the earning power, expenses, or financial obligations of a spouse will be affected by reason of serving as the custodian of a minor child;
>
> (8) The standard of living of the spouses established during the marriage;
>
> (9) The relative education of the spouses and the time necessary to acquire sufficient education or training to enable the spouse seeking alimony to find employment to meet his or her reasonable economic needs;
>
> (10) The relative assets and liabilities of the spouses and the relative debt service requirements of the spouses, including legal obligations of support;
>
> (11) The property brought to the marriage by either spouse;
>
> (12) The contribution of a spouse as homemaker;
>
> (13) The relative needs of the spouses;
>
> (14) The federal, State, and local tax ramifications of the alimony award;
>
> (15) Any other factor relating to the economic circumstances of the parties that the court finds to be just and proper.
>
> (16) The fact that income received by either party was previously considered by the court in determining the value of a marital or divisible asset in an equitable distribution of the parties' marital or divisible property.

N.C.G.S. § 50-16.3A(b) (2019). "[T]he [trial] court shall make a specific finding of fact on each of the factors [listed above] if evidence is offered on that factor." N.C.G.S. § 50-16.3A(c) (2019).

¶ 23 Here, the trial court made findings of fact reflecting that when the trial court determined the amount of alimony awarded to Rebecca, it considered all the factors for which evidence was offered.

¶ 24 Pursuant to N.C.G.S. § 50-16.3A(b)(1), the trial court considered "marital misconduct of either of the spouses," as illustrated in Findings of Fact 89, 90, 91, 92, and 93:

> 89. The parties had difficulties during their marriage. [Michael] confessed to watching too much pornography. In 2015, [Michael] attended a conference in Minnesota to treat his addiction. He also joined a support group.
>
> 90. Approximately eight months before separation, [Rebecca] moved into the basement and began asking [Michael] to leave the home.
>
> 91. [Michael] then began restricting [Rebecca's] access to company data and he withheld funds from [Rebecca].
>
> 92. [Rebecca] set up a video camera in the home without [Michael's] knowledge and changed the lock on the safety deposit box.
>
> 93. The [trial] [c]ourt does not find that these things rise to the level of marital fault. There was no credible evidence of illicit sexual conduct during the marriage.

See N.C.G.S. § 50-16.3A(b)(1) (2019).

¶ 25 Pursuant to N.C.G.S. § 50-16.3A(b)(2), the trial court considered "[t]he relative earnings and earning capacities of the spouses," as illustrated in Findings of Fact 18, 19, 20, 43, and 44:

> 18. After the parties' separation, in October 2017 [] [Rebecca] began working as a preschool teacher at Good Shephard Lutheran Church. [Rebecca] typically works Tuesday through Friday from 9:30 a.m. until 1:30 p.m. This allows her to be home with the children after school.
>
> 19. [Rebecca] is currently only working part-time. If [Rebecca] were to work a full-time job, she would require childcare assistance before and after school.

> 20. In 2018 [Rebecca] earned $8,959.39. She is currently working part-time as a preschool teacher.
>
> . . . .
>
> 43. [Rebecca] is currently earning $8,959[.00] per year from her employment. The [trial] [c]ourt cannot find that [Rebecca] is acting in bad faith and will not impute income.
>
> 44. [Rebecca's] monthly income, for purposes of calculating child support and alimony, is $128,959[.00] annually (or $10,748.58 per month).

See N.C.G.S. § 50-16.3A(b)(2) (2019).

¶ 26 Pursuant to N.C.G.S. § 50-16.3A(b)(3), the trial court considered "[t]he ages and the physical, mental, and emotional conditions of the spouses," as illustrated in Findings of Fact 84, 95, and 96:

> 84. In determining the amount and duration of alimony, th[e] [trial] [c]ourt has considered, among other things, the duration of the parties[']marriage, the relative ages and health of the parties, [Rebecca's] role as primary caregiver to the parties' minor children, the financial needs of the parties, the incomes and earnings of the parties, the earning capacities of the parties, and the reasonable expenses of the parties.
>
> . . . .
>
> 95. During the marriage, [Rebecca] had several health conditions, including ADHD, hearing loss, and "XLH." She regularly took medications.
>
> 96. The parties are close in age. [Rebecca] is 45 years old and [Michael] is 43.

See N.C.G.S. § 50-16.3A(b)(3) (2019).

¶ 27 Pursuant to N.C.G.S. § 50-16.3A(b)(5), the trial court considered "[t]he duration of the marriage," as illustrated in Findings of Fact 84 and 97:

> 84. In determining the amount and duration of alimony, th[e] [trial] [c]ourt has considered, among other things, the duration of the parties[']marriage, the relative ages and health of the parties, [Rebecca's]

> role as primary caregiver to the parties' minor children, the financial needs of the parties, the incomes and earnings of the parties, the earning capacities of the parties, and the reasonable expenses of the parties.
>
> . . . .
>
> 97. Based on the length of the marriage, the relative age and health of the parties, the age of the children (16, 15, and 12), and the time [Rebecca] needs to re-enter the work force, the [trial] [c]ourt finds that an alimony payment should be made for a period of 6 years.

See N.C.G.S. § 50-16.3A(b)(5) (2019).

¶ 28 Pursuant to N.C.G.S. § 50-16.3A(b)(8), the trial court considered "[t]he standard of living of the spouses established during the marriage," as illustrated in Finding of Fact 63:

> 63. During their marriage, the parties used income from Sequence[] to pay personal expenses, such as automobile loan payments and insurance. The parties were able to live an extravagant lifestyle during their marriage. They vacationed frequently and owned a nice home.

See N.C.G.S. § 50-16.3A(b)(8) (2019).

¶ 29 Pursuant to N.C.G.S. § 50-16.3A(b)(9), the trial court considered "[t]he relative education of the spouses and the time necessary to acquire sufficient education or training to enable the spouse seeking alimony to find employment to meet his or her reasonable economic needs," as illustrated in Finding of Fact 84:

> 84. In determining the amount and duration of alimony, th[e] [trial] [c]ourt has considered, among other things, the duration of the parties['] marriage, the relative ages and health of the parties, [Rebecca's] role as primary caregiver to the parties' minor children, the financial needs of the parties, the incomes and earnings of the parties, the earning capacities of the parties, and the reasonable expenses of the parties.

See N.C.G.S. § 50-16.3A(b)(9) (2019).

¶ 30 Pursuant to N.C.G.S. § 50-16.3A(b)(10), the trial court considered "[t]he relative assets and liabilities of the spouses and the relative debt service requirements of the spouses," as illustrated in Findings of Fact 65 and 74:

> 65. In order to buyout [Rebecca's] portion of the business, [Michael] borrowed three million dollars ($3,000,000[.00]) in funds from Sequence[]. Each month, [Michael] is receiving $80,000[.00] in distributions from the company. Of that amount, [Michael] uses $53,906[.00] per month to repay the loan to Sequence, [] leaving him with a net distribution of $26,094[.00] per month. The loan to Sequence will be paid off in June 2023.
>
> . . . .
>
> 74. On his Financial Affidavit, [Michael] listed regular recurring monthly expenses as of the date of separation in the amount of $16,353[.00]. In addition to his loan repayment and his court-ordered support payment, he listed his current (as of June 2019) regular monthly expenses in the amount of $13,219[.00].

See N.C.G.S. § 50-16.3A(b)(10) (2019).

¶ 31 Pursuant to N.C.G.S. § 50-16.3A(b)(12), the trial court considered "[t]he contribution of a spouse as homemaker," as illustrated in Finding of Fact 17:

> 17. During the marriage of the parties, [Rebecca] was the primary caretaker for the minor children. Except as a substitute teacher on occasion at her children's school, Envision Science Academy, [Rebecca] did not work outside the home after the birth of the first child.

See N.C.G.S. § 50-16.3A(b)(12) (2019).

¶ 32 Pursuant to N.C.G.S. § 50-16.3A(b)(13), the trial court considered "[t]he relative needs of the spouses," as illustrated in Findings of Fact 61 and 84:

> 61. The [trial] [c]ourt finds that [Rebecca's] total monthly need is $4,000[.00] per month.
>
> . . . .

> 84. In determining the amount and duration of alimony, th[e] [trial] [c]ourt has considered, among other things, the duration of the parties[']' marriage, the relative ages and health of the parties, [Rebecca's] role as primary caregiver to the parties' minor children, the financial needs of the parties, the incomes and earnings of the parties, the earning capacities of the parties, and the reasonable expenses of the parties.

See N.C.G.S. § 50-16.3A(b)(13) (2019).

¶ 33 Finally, pursuant to N.C.G.S. § 50-16.3A(b)(16), the trial court considered "[t]he fact that income received by either party was previously considered by the court in determining the value of a marital or divisible asset in an equitable distribution of the parties' marital or divisible property," as illustrated in Findings of Fact 23 and 65:

> 23. After the parties separated, they reached an agreement regarding the distribution of their property in May 2018. As a result of this Consent Order, [Michael] was awarded the Sequence business, and [Rebecca] received approximately $3,000,000[.00] which she was able to invest. She also received a payout of $225,000[.00] for the Beach House, which house was kept by [Michael].
>
> . . . .
>
> 65. In order to buyout [Rebecca's] portion of the business, [Michael] borrowed three million dollars ($3,000,000[.00]) in funds from Sequence[]. Each month, [Michael] is receiving $80,000[.00] in distributions from the company. Of that amount, [Michael] uses $53,906[.00] per month to repay the loan to Sequence, [] leaving him with a net distribution of $26,094[.00] per month. The loan to Sequence will be paid off in June 2023.

See N.C.G.S. § 50-16.3A(b)(16) (2019).

¶ 34 The findings of fact listed above are unchallenged and binding on appeal. *Juhnn*, 242 N.C. App. at 63, 775 S.E.2d at 313. No evidence was offered for the remaining factors under N.C.G.S. § 50-16.3A(b)(4), (6), (7), (11), (14), and (15) and the trial court was not required to make findings as to these factors. N.C.G.S. § 50-16.3A(c) (2019). The trial court

considered all relevant and required statutory factors in determining the alimony payment to Rebecca and did not abuse its discretion in awarding alimony in the amount of $2,100.00 per month to Rebecca.

CONCLUSION

¶ 35 The trial court did not abuse its discretion in calculating Rebecca's reasonable monthly expenses. Additionally, the trial court did not abuse its discretion in ordering Michael to pay Rebecca $2,100.00 per month in alimony. The *Order on Alimony, Temporary Child Support and Attorney's Fees* is affirmed.

AFFIRMED.

Judges TYSON and JACKSON concur.

GERALD STEVEN SPRINKLE, JR., PLAINTIFF
v.
MATTHEW JOHNSON, DEFENDANT

No. COA20-32

Filed 3 August 2021

1. Appeal and Error—preservation of issues—lack of notice for trial—due process implications—Rule 2

The Court of Appeals invoked Appellate Rule 2 to review defendant's claim that he did not receive notice for trial (involving claims for alienation of affection and criminal conversation) where, even though defendant did not preserve any issues for appellate review because he was not present at trial and subsequently filed but withdrew his Civil Procedure Rule 59/60 motion before obtaining a ruling, the implication of important due process rights merited review of the issue.

2. Notice—lack of notice for trial—no evidence of receipt—due process violation

Defendant's due process rights were violated in a case involving claims of alienation of affection and criminal conversation where there was no evidence he received notice of trial and where, as a result, he did not appear in court and only learned of the nearly $2.3 million judgment against him some time later. Although the parties disputed which address was proper for defendant, there also

was no evidence that defendant had been served at any address with an order allowing his attorney to withdraw (prior to trial), a pre-trial order that was entered without a hearing, or calendar notice of the trial. Judgment was vacated and the matter remanded for a new trial.

Appeal by defendant from order and judgment entered 17 June 2019 and 1 July 2019 by Judge Anna Mills Wagoner in Rowan County Superior Court. Heard in the Court of Appeals 11 May 2021.

Lisa Costner for plaintiff-appellee.

Collins Family Law Group, by Rebecca K. Watts, for defendant-appellant.

GORE, Judge.

¶ 1 Gerald Steven Sprinkle, Jr., ("plaintiff") filed suit against Dr. Matthew Johnson ("defendant") for alienation of affection and criminal conversation, alleging that defendant engaged in a romantic relationship and sexual acts with his wife Jana Sprinkle ("Mrs. Sprinkle"). Following a jury trial, at which defendant was neither present nor represented by counsel, judgment was entered awarding plaintiff a total of $2,294,000.00 in compensatory and punitive damages from defendant. Upon review, we conclude that defendant did not have notice of trial and vacate and remand the judgment against him.

I. Factual and Procedural Background

¶ 2 Mrs. Sprinkle worked at defendant's oral surgery practice in Mooresville, North Carolina, for seventeen years as a surgical assistant. Over a period of four years during her employment, defendant and Mrs. Sprinkle engaged in a romantic and sexual relationship.

¶ 3 In 2014, defendant initiated sexually explicit conversation with Mrs. Sprinkle and touched her bottom at work. As the affair progressed, defendant provided Mrs. Sprinkle with Adderall, a cell phone for communicating with him, and the two met at hotel rooms and his house on Lake Norman to have sexual intercourse. The affair came to a halt when another employee discovered a photograph on defendant's phone of Mrs. Sprinkle participating in a sexual act with him. That photograph was eventually seen by Mrs. Sprinkle's cousin. Mrs. Sprinkle then told her husband, plaintiff, about the affair. While plaintiff and Mrs. Sprinkle decided to reconcile, the affair resulted in Mrs. Sprinkle's loss of employment, and plaintiff sought mental health treatment and incurred related expenses.

¶ 4 On 23 March 2018, plaintiff filed suit against defendant for alienation of affection and criminal conversation. Plaintiff properly served defendant with the complaint at his business address on Medical Park Road in Mooresville. Plaintiff alleged that defendant and Mrs. Sprinkle engaged in sexual intercourse on multiple occasions in North Carolina during the marriage, and defendant's actions interfered with a genuine love and affection that existed in the marital relationship between them.

¶ 5 Upon receiving service of the complaint on 3 May 2018, defendant hired an attorney and was granted a thirty-day extension to file an answer. Defendant filed an answer on 5 July 2018 and also filed motions to dismiss and bifurcate. Those filings were later amended and refiled on 24 July 2018.

¶ 6 The parties and their respective counsel participated in court-ordered mediation on 11 January 2019. The filed Report of Mediator in Superior Court Civil Action represented that the parties settled the dispute and arrived to an "agreement on all issues." The report stipulated that plaintiff's attorney would file a notice of dismissal no later than 30 June 2019. The mediator notified the trial court that the matter had been settled in mediation, but it could not be dismissed before the end of June as to allow defendant requisite time to pay the agreed upon amount. The mediator's report did not specify the agreement's substantive terms. The only indication of the agreement reached in mediation is evidenced in a nearly illegible handwritten note authored by plaintiff's attorney. The note's only decipherable writing is its apparent title of "Agreement 1/11/19." There is no further indication as to what the parties agreed to, nor the extent to which those terms were mutually abided by.

¶ 7 Defendant's counsel moved to withdraw from representation in the matter on 22 March 2019, citing defendant's lack of communication, contempt towards his legal advice, and failure to procure payment for legal fees. The motion to withdraw as counsel was granted by a court order on 15 April 2019. In a certificate of service attached to that motion, counsel certified that he had served defendant with both the motion and the notice of hearing regarding the same by mail sent to an address on Beaten Path Road in Mooresville. Defendant's attorney believed this to be the correct mailing address.

¶ 8 On 17 June 2019, the trial court entered a Pre-Trial Order without holding a pre-trial conference. The Pre-Trial Order contained stipulations and agreements but was not signed by defendant or an attorney representing him. The Order was signed by only plaintiff's attorney and the trial court. The Order states that plaintiff's attorney, after due diligence, was unable to arrange a time with defendant for a pre-trial conference.

¶ 9 The trial was conducted from 24 June to 25 June 2019 before a jury in Rowan County Superior Court. Defendant was neither present at trial nor represented by counsel. On 25 June 2019, the jury rendered a verdict for plaintiff in the amount of $794,000.00 in compensatory damages and $1,500,000.00 in punitive damages, for a total award of $2,294,000.00. The trial court entered judgment reflecting the jury verdict on 1 July 2019.

¶ 10 Later, defendant was contacted by a reporter who inquired about the verdict against him. Defendant claims that, until that moment, he was unaware the trial had been held or that a judgment had been entered. He then hired new counsel who obtained the court file, where he first learned that his previous attorney had withdrawn. Defendant claims he also learned of the Pre-Trial Order, the trial date, and the $2,294,000.00 judgment from the court file.

¶ 11 On 11 July 2019, Defendant's attorney filed a motion pursuant to Rules 59 and 60 of the North Carolina Rules of Civil Procedure (hereinafter, "Rule 59/60 motion"), requesting a new trial. In the alternative, Defendant requested relief from the Pre-Trial Order, the judgment entered, or a new pre-trial conference. Plaintiff filed a response to that motion, and a motion for sanctions pursuant to Rule 11 of the North Carolina Rules of Civil Procedure.

¶ 12 In an affidavit, defendant stated that although he formerly resided at the Beaten Path Road address, he moved from that property around or before November 2018. He further stated that in December 2018 and January 2019, he informed his attorney that he had moved and was living in temporary housing. Additionally, he claims he never received mail at the Beaten Path Road address, but instead has used his Medical Park Road business address for receiving mail, and the property tax card for the Beaten Path Road address lists his business address as the appropriate mailing address. Defendant also stated that his former attorney always communicated with him by phone or text message, and he never received notice of his counsel's motion to withdraw, the Pre-Trial Order, or notice of trial by those means. Additionally, defendant's ex-wife, Ms. Regina Johnson, corroborated by affidavit defendant's timeline regarding his place of residence.

¶ 13 On 31 July 2019, Defendant withdrew his Rule 59/60 motion. In response, plaintiff dismissed his Rule 11 motion, which indicated mail service on defendant at three addresses: (1) Beaten Path Road; (2) Fern Hill Road; and (3) the Medical Park Road business address. On the same day, defendant's counsel filed a Motion to Withdraw, which was granted. Defendant filed a *pro se* Notice of Appeal and listed his address as the Medical Park Road business address.

II. Discussion

¶ 14 On appeal, defendant argues that the trial court abused its discretion in entering a Pre-Trial Order without holding a pre-trial conference. Specifically, he contends that the trial court exceeded its authority by entering stipulations and agreements of the parties when both parties did not actually stipulate or agree, and that Order effectively dispensed with our Rules of Evidence. Additionally, he argues that he was deprived his right to due process when he was not provided with notice of the date, time, or place of the trial.

¶ 15 **[1]** As a preliminary matter, defendant failed to preserve his issues on appeal, and any issue presented regarding lack of notice for trial, or the Pre-Trial Order, are not properly before this Court. Rule 10 of the North Carolina Rules of Appellate Procedure provides in pertinent part:

> In order to preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection, or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context. It is also necessary for the complaining party to obtain a ruling upon the party's request, objection, or motion.

N.C. R. App. P. 10(a)(1). "[I]t is well-established that the North Carolina Rules of Appellate Procedure are mandatory and failure to follow these rules will subject an appeal to dismissal." *Stann v. Levine*, 180 N.C. App. 1, 3, 636 S.E.2d 214, 215 (2006) (*purgandum*). Given that defendant was absent from trial and not represented by counsel, he did not have an opportunity to present a timely request or objection in open court. Furthermore, defendant voluntarily withdrew his Rule 59/60 motion and supporting affidavits, without a hearing on the merits, before the trial court could render a decision upon his motion. "It is well settled that an error, even one of constitutional magnitude, that defendant does not bring to the trial court's attention is waived and will not be considered on appeal." *State v. Bursell*, 372 N.C. 196, 199, 827 S.E.2d 302, 305 (2019) (quotation marks and citation omitted).

¶ 16 However, notice is a fundamental requirement of due process. In accordance with Rule 2 of the Appellate Rules of Procedure, this Court may "suspend or vary the requirements or provisions of any of these rules[,]" *sua sponte* or upon the motion of a party, "[t]o prevent manifest injustice to a party, or to expedite decision in the public interest" except where the rules otherwise expressly prohibit. N.C. R. App. P. 2. "[T]his

residual power . . . may be drawn upon where the justice of doing so or the injustice of failing to do so appears manifest to the Court." *Blumenthal v. Lynch*, 315 N.C. 571, 578, 340 S.E.2d 358, 362 (1986) (citation omitted). "Rule 2 must be applied cautiously, and it may only be invoked in exceptional circumstances. A court should consider whether invoking Rule 2 is appropriate in light of the specific circumstances of individual cases and parties, such as whether substantial rights of an appellant are affected." *Bursell*, 372 N.C. at 200, 827 S.E.2d at 305-06 (quotation marks and citations omitted).

¶ 17 "Notice and an opportunity to be heard prior to depriving a person of his property are essential elements of due process of law which is guaranteed by the Fourteenth Amendment of the United States Constitution and Article 1, section 17, of the North Carolina Constitution." *Swanson v. Herschel*, 174 N.C. App. 803, 805, 622 S.E.2d 159, 160-61 (2005) (quotation marks and citation omitted). "This right to be heard has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to appear or default, acquiesce or contest." *Mullane v. Cent. Hanover Bank & Tr. Co.*, 339 U.S. 306, 314, 94 L. Ed. 865, 873 (1950).

> It is a principle, never to be lost sight of, that no person should be deprived of his property or rights, without notice and an opportunity of defending them. This right is guaranteed by the constitution. Hence it is, that no Court will give judgment against any person, unless such person have an opportunity of sh[o]wing cause against it. A judgment entered up otherwise would be a mere nullity.

Den ex dem. Hamilton v. Adams, 6 N.C. 161, 162 (1812). Considering the circumstances of this case, and the manifest necessity of due process, this Court invokes Rule 2 as to permit appellate review. "Whether a party has adequate notice is a question of law, which we review *de novo*." *Id.* at 805, 622 S.E.2d at 160 (citation omitted).

¶ 18 **[2]** In *Laroque v. Laroqu*e, this Court examined notice requirements as governed by Rules of Civil Procedure and the General Rules of Practice. 46 N.C. App. 578, 580, 265 S.E.2d 444, 445 (1980). This Court held that the defendant did not receive the requisite notice of trial when nothing on the record indicated that a trial calendar request or certificate of readiness was mailed to him. *Id.* at 581-82, 265 S.E.2d at 446-47. In reaching its decision, this Court reasoned that:

> Rule 2 of the Rules of Practice, by requiring notice of the calendaring of a case, secures to a party the opportunity to prepare his case for trial and to be present for trial or to seek a continuance. Although the rule specifies that the calendar be sent to each attorney of record and that the copy of the certificate or readiness be sent to opposing counsel, it is implicit in the rule that where a party is not represented by counsel he is entitled to the same notice. We note that it has long been the practice in this State that when a party to an action does not have counsel, a copy of each calendar on which his action appears calendared for trial is mailed to him at the last address available to the Clerk.

Id. at 581, 265 S.E.2d at 446 (1980) (citation omitted). "[R]ule [2] contemplates that systematic notice of the calendaring of a case be given to a party at each stage of the calendaring process." *Id.* at 580, 265 S.E.2d at 446.

¶ 19 In *Brown v. Ellis*, this Court also addressed notice requirements in an action involving alienation of affection and criminal conversation claims. 206 N.C. App. 93, 94, 696 S.E.2d 813, 816 (2010). In *Brown*, the "defendant's attorney's motion to withdraw, the order allowing the motion to withdraw, the order setting the trial date, and the trial calendar mailed from the trial court were all mailed to the incorrect address." *Id.* at 102-03, 696 S.E.2d at 820. Further, the record was silent as to whether "defendant received any notices or documents regarding the case after the trial court denied his motion to dismiss[.]" *Id.* at 103, 696 S.E.2d at 820. The defendant neither appeared at trial, nor was he represented at trial, and judgment was entered against him in the amount of $600,000.00. *Id.* at 94, 696 S.E.2d at 815.

¶ 20 This Court held that the defendant was entitled to a new trial because lack of adequate notice did not comport with the requirements of due process. *Id.* at 109, 696 S.E.2d at 824. This Court contrasted its decision in *Laroque* with that in *Dalgewicz v. Dalgewicz*, 167 N.C. App. 412, 606 S.E.2d 164 (2004), where the defendant received notice that his case was calendared for trial but failed to appear because he was "neglectful and inattentive to his case." 167 N.C. App. 412, 418, 606 S.E.2d 164, 168 (2004). In *Brown*, this Court concluded that:

> neither the scheduling order nor the court calendar was mailed to the service address, through no fault of

> defendant. Defendant had no way of knowing and no reason to know that both his original counsel and the trial court were sending documents to him at an incorrect address until after he was notified of the trial three days before it was to begin and he was able to contact an attorney in North Carolina.

Brown, 206 N.C. App. at 108, 696 S.E.2d at 823.

¶ 21 In the case *sub judice*, counsel for defendant listed the address on Beaten Path Road in Mooresville as the address he served defendant with notice of the motion to withdraw and hearing on that motion. However, nothing in the record indicates that defendant received that notice. Plaintiff argues that it was reasonable to rely on the address listed on the pleadings filed by defendant's attorneys, and that defendant was under a continuing duty to keep opposing counsel informed of his correct address. However, assuming *arguendo*, that service at the Beaten Path Road address was proper, the record simply does not reflect that defendant was served with the order allowing defense counsel to withdraw, the Pre-Trial Order, calendar notice, or notice of trial at any address.

¶ 22 The facts before us do not indicate that defendant was negligent or inattentive to his case. This is a case where defendant never received proper notice of trial. This court concludes that a failure to provide proper notice violated defendant's due process rights and entitles him to a new trial. Accordingly, we need not address his remaining arguments.

VACATED AND REMANDED.

Judges ARROWOOD and COLLINS concur.

STATE v. ABBITT

[278 N.C. App. 692, 2021-NCCOA-403]

STATE OF NORTH CAROLINA
v.
SINDY LINA ABBITT

STATE OF NORTH CAROLINA
v.
DANIEL ALBARRAN

No. COA20-309

Filed 3 August 2021

1. Evidence—murder trial—potentially exculpatory evidence—other possible perpetrators—not inconsistent with defendant's guilt

In a joint murder trial, there was no prejudicial error in the trial court's decision to exclude defendants' proffered evidence—including a handgun and latex gloves that belonged to another person—that they contended showed two other people committed the crimes for which they were charged. The evidence was not inconsistent with direct and eyewitness evidence of either defendant's guilt and merely tended to suggest that another person may have been involved in the crimes.

2. Identification of Defendants—pretrial photographic lineup—constitutional challenge—in-court identification also made—plain error analysis

In a murder trial, there was no prejudice in the introduction of the results of a pretrial photographic lineup in which the victim's mother identified defendant as being involved in the events that led to her daughter's shooting, where the mother also made an independent in-court identification of defendant based on her personal experience from being present at the scene of the crime.

3. Criminal Law—prosecutor's closing argument—lack of evidence from defendant—objection overruled

In a murder trial, the trial court did not abuse its discretion by overruling defendant's objection to the prosecutor's statement during closing argument regarding defendant's failure to produce evidence of an alibi defense.

4. Criminal Law—defense counsel's closing argument—appearance of defendant at time of crime—presence of tattoos—no mention by eyewitness

In a trial for murder, the trial court properly sustained the prosecutor's objection to defense counsel's closing argument noting an eyewitness's failure to mention that defendant had tattoos, in comparison with defendant's in-court appearance. A reference to defendant's appearance from the crime two years prior had no bearing on the witness's identification of defendant where she testified that defendant was wearing long sleeves at the time, which would have covered up any tattoos he had on his arms, and where there were no tattoos visible in the pretrial photo lineup, from which the witness identified defendant.

5. Evidence—hearsay—out-of-court statements—by defendant to officer

In a joint murder trial, there was no error in the admission of one defendant's out-of-court statements, made to a law enforcement officer, in which she denied knowing her co-defendant and declared she had not seen the victim in years. The statements were admissible, relevant, and did not give rise to a reasonable possibility that, absent their admission, the jury would have reached a different verdict.

6. Indictment and Information—first-degree murder—short-form indictment

A short-form indictment was sufficient to charge defendant with first-degree murder and confer jurisdiction on the trial court.

Judge MURPHY concurring in part and dissenting in part.

Appeal by defendants from judgments entered 13 March 2019 by Judge Lori I. Hamilton in Rowan County Superior Court. Heard in the Court of Appeals 25 May 2021.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Sandra Wallace-Smith, for the State.

Anne Bleyman for defendant-appellant Sindy Lina Abbitt.

Rudolf Widenhouse, by M. Gordon Widenhouse, Jr., for defendant-appellant Daniel Albarran.

TYSON, Judge.

¶ 1 Sindy Abbitt ("Abbitt") and Daniel Albarran ("Albarran") (together: "Defendants") were indicted for the murder of Lacynda Feimster and other crimes related thereto. The jury returned guilty verdicts against Abbitt for first-degree murder on the bases of malice, premeditation, deliberation, and felony murder, attempted robbery with a dangerous weapon, and assault with a deadly weapon. Albarran was convicted by the jury of first-degree felony murder, attempted robbery with a dangerous weapon, and assault with a deadly weapon. We find no error.

I. Background

¶ 2 Mary Gregory ("Gregory") lived on Crown Point Drive in May 2016 with her daughter, Lacynda Feimster, ("Feimster") and Feimster's two children: three-year-old Meaco; and, nineteen-year-old NaKyia. Gregory was at home and caring for Meaco when Feimster arrived home from work on 24 May 2016. Feimster had worked at an O'Charley's restaurant, and she had bought juice and diaper wipes at a Food Lion supermarket before returning home between 10:00 p.m. and 11:00 p.m.

¶ 3 Gregory and Meaco were located in the living room and heard Feimster's car arrive in the parking lot. Feimster took longer than usual to come inside the apartment. When Feimster walked into the apartment, a Black female and Hispanic male walked into the apartment behind her.

¶ 4 The male was described as tall, with slicked-back, black hair. He wore a long-sleeved white shirt, jacket, white low top sneakers, and dirty latex gloves. Gregory described the female as stocky and dark-skinned with shoulder-length hair. She was wearing red tennis shoes and a shirt with a design on the front. Regarding the female's stature, Gregory described her as, "medium, short. She was just average. Not quite average height." Gregory testified she had never seen either the woman or the man with Feimster previously.

¶ 5 After Feimster and the perpetrators entered the apartment, the male locked the front door behind them. Gregory asked Feimster if everything was okay, Feimster replied: "Yes, mama, I got this." Feimster and the female walked directly into Feimster's bedroom and closed the door. Gregory and Meaco remained on the living room sofa with the Hispanic male present.

¶ 6 Meaco eventually went into the bedroom and sat on his mother's lap. Gregory asked the man for his name and where he lived, but he declined to answer. Gregory attempted to call her granddaughter to come and take Meaco away from the apartment, but the man took her cellular flip phone. He told Gregory she could call "when everything was over."

¶ 7 Gregory testified the man was within arms-length away from her, the apartment was "well-lit" and nothing obstructed her view of the man. Gregory testified that while she waited on the sofa, the man paced back and forth. For the duration of the intrusion, the male opened the front door several times to peer outside, and he and the female perpetrator talked about "a phone call."

¶ 8 The man made two or three cell phone calls. During one of the calls, Gregory testified he said, "She wants to know how far you are. Where are you? How far away are you?" After that phone call, the man went to Feimster's bedroom and talked to the female perpetrator. Gregory was ordered to join them in the bedroom.

¶ 9 Gregory testified the female left the bedroom momentarily. Gregory saw she had a gun when she returned to the "well-lit" bedroom. The female hit Gregory in her face with the gun, and she fell to the floor. Gregory testified, "She told me to stay down. She said she didn't want to hurt me because I didn't have nothing (sic) to do with it and it didn't have anything to do with me." Gregory described the gun as small, black, with a brown handle.

¶ 10 Gregory testified when she arose from the floor, Feimster, Meaco and the female were located by the bedroom door. At some point during the incident, Feimster told the female perpetrator, "If I had it I would give it to you. I don't have any money." Gregory testified, "The next thing I know [Feimster] and Meaco are down on the floor . . . [Feimster] has got Meaco. They're in a fetal position and you can't see Meaco." Gregory explained the female perpetrator had her knee and hand on Feimster, holding her down on the floor.

¶ 11 The female said to Feimster, "Bitch, you should have gave (sic) me the mother f***ing money." The female perpetrator then shot Feimster in the head and ran out of the apartment. Gregory called 911 in hysterics; she was yelling for help and portions of the call are inaudible. The 911 operator asked, "Did he have a weapon?" Gregory said, "Yes. (inaudible) had a gun and she shot my daughter." The 911 operator recording of a computer-aided dispatch asserted, "Male had a gun and shot the female." The police and EMS arrived. Gregory was transported to the hospital and treated with eight stiches for her broken nose. Meaco was not physically injured.

¶ 12 At trial, forensic pathologist, Nabila Haikal M.D., testified that she performed an autopsy on Feimster on 25 May 2016. Dr. Haikal testified Feimster's life was taken by a gunshot wound to the head, it took minutes for Feimster to die, and she had suffered other injuries suggesting blunt force trauma on the scalp.

¶ 13 Salisbury Police investigators developed a suspect named Ashley Phillips ("Phillips"). Phillips was the first person identified by Feimster's family. A confidential informant identified a car connected to Phillips as being present at the murder scene on 24 May. Phillips came to the police station after the crimes driving this car.

¶ 14 Police officers found a .25 caliber Lorcin pistol and white latex gloves inside the glove compartment of her car. DNA swabs were taken from these items, but they were not submitted for testing. There were also three spent shell casings matching the .25 caliber of the pistol inside the car.

¶ 15 Gregory was shown a photograph of Phillips and said, "she does look like her," referring to the female who had shot Feimster, but the police did not do a photographic lineup including Phillips' picture.

¶ 16 Inside Feimster's bedroom, a .25 caliber shell casing was found on the floor under Feimster's body. Police also discovered a black drawstring bag in the bedroom with a Taurus revolver inside.

¶ 17 Defense counsel explained to the court that Bureau of Alcohol, Tobacco, Firearms, and Explosives Agent Kevin Kelly ("Agent Kelly") took the .25 shell casing found at the scene and sent it to Jamie Minn ("Minn") along with two shell casings he had test fired himself from the pistol recovered in Phillips' car. Minn received all three shell casings.

¶ 18 Minn was not tendered as a firearms expert at the time of testing, but she examined the shell casings and reported "she could not say it was not the gun used, she also told them there was a likelihood it could be the gun that was used and explained to them how to get further testing that they did not do." The Lorcin pistol and shell casings found in Phillips' car and under Feimster's body produced inconclusive results. The Lorcin pistol was eventually returned to Phillips.

¶ 19 Three days after Feimster was killed, police conducted two photographic lineups with Gregory on 27 May 2016. One lineup involved a photo array of six pictures of males, including a photo of Albarran. Gregory became emotional and visibly upset upon being shown Albarran's photo. She was certain he was the Hispanic male inside of her home and involved in the crimes. The photo lineup was recorded and played for the jury. The second photographic lineup involved a photo array of six Black females, including Abbitt. Gregory selected Abbitt's picture with certainty as the Black woman who had shot and killed her daughter.

¶ 20 Police officers interviewed Abbitt. She admitted she knew Feimster through her sister but asserted she had not seen her in several years.

Abbitt denied being at Crown Point Drive or inside the victim's home on 24 May.

¶ 21 Abbitt claimed, as an alibi, she was home all night at 340 Adolphus Road at a cookout the night Feimster was killed, and other individuals were with her. Abbitt's counsel filed pretrial notice of an alibi defense. None of those asserted individuals were called or testified during trial.

¶ 22 Federal Bureau of Investigation Special Agent Michael Sutton ("Agent Sutton") of the cellular analysis survey division, testified about each of Defendants' cellular phone usage from 23-26 May 2016. Agent Sutton analyzed cell numbers: (704) 645-1373, and (704) 223-7882. The parties stipulated that on or about 24 May 2016, Sindy Abbitt's telephone number was (704) 223-7882.

¶ 23 Salisbury Police Sergeant Travis Schulenburger ("Sergeant Schulenburger") testified Albarran's cellular number at that time was (704) 645-1373. Sergeant Schulenburger testified he had observed a "323" tattoo on Albarran's body. Albarran told him during an interview he had grown up in Los Angeles. The area around Los Angeles is assigned a "323" area code. Albarran stated some people call him "L.A."

¶ 24 The calls Defendants made on 24 May 2016 were relayed by the cell phone towers located at or near the O'Charley's restaurant, the Food Lion supermarket, and Adolphus Road, all of which are located in south Salisbury and in the vicinity of Feimster's apartment.

¶ 25 Agent Sutton testified that on 24 May 2016, from at least 6:09 p.m. to 7:12 p.m., both of Defendants' phones used sectors of towers that provided service to an area that included the 340 Adolphus Road address. No later than 7:32 p.m., Albarran's phone had moved from the south Salisbury location to an area near the O'Charley's restaurant where Feimster had worked. By 10:41 p.m., Abbitt's phone had moved from the area south of Salisbury and used the sector of the cell tower which provided service to an area that included the Food Lion supermarket where Feimster had purchased juice and baby wipes.

¶ 26 Albarran's phone used sectors of towers that provided service to the area that included the Food Lion supermarket and Gregory's apartment at 11:02 p.m., 11:04 p.m. and 11:07 p.m. The sectors used at 11:02 p.m., and 11:07 p.m., had also provided service to the O'Charley's restaurant. On 24 May 2016, by no later than 11:58 p.m., both phones had moved south back to a tower which served an area that included Adolphus Road. There were approximately twelve contacts between the Defendants' two phones from 23 May 2016 through 26 May 2016.

¶ 27 Albarran and Abbitt both denied knowing each another. Abbitt was arrested on 23 June 2016. Albarran was arrested on 17 August 2016. Gregory identified both Albarran as the male perpetrator and Abbitt as the female perpetrator in open court. The defense requested forensic analysis of a pink cell phone recovered from the coffee table in the victim's apartment. Defense did not request analysis from the Salisbury Police Department for any other items.

¶ 28 Defendants were joined for noncapital trials on 4 March 2019. The jury's verdicts convicted Abbitt of first-degree murder on the bases of both premeditation and deliberation and felony murder, attempted robbery with a dangerous weapon, and assault with a deadly weapon. The jury's verdicts convicted Albarran of first-degree murder on the bases of felony murder, attempted robbery with a dangerous weapon, and assault with a deadly weapon.

¶ 29 Abbitt was sentenced to life without possibility of parole for murder and to concurrent sentences of 73 to 100 months and 150 days for the additional crimes. Albarran was sentenced to life without possibility of parole for the first-degree murder, and to concurrent sentences of 84 months to 113 months and 150 days for the additional crimes. Defendants timely appealed.

II. Jurisdiction

¶ 30 These appeals arise from final judgments in a criminal case pursuant to N.C. Gen. Stat. § 7A-27(b) (2019).

III. Issues

¶ 31 Six issues are asserted before this Court on appeal. Both parties appeal the trial court's refusal to allow them to introduce evidence to implicate third parties. Albarran also asserts the photographic lineup was suggestive, the trial court erred overruling his objections to the State's assertion he had failed to present evidence, and his counsel's closing argument was flawed.

¶ 32 Abbitt individually challenges the admission of her out-of-court denials of seeing the victim the day of the murder and the sufficiency of the indictment to support the State proceeding on each element of first-degree murder.

IV. Refusal to Allow Evidence Implicating Others

¶ 33 **[1]** Defendants argue the trial court erred by failing to admit relevant evidence tending to show two other people had committed the crimes for which they were charged.

¶ 34 " 'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." N.C. Gen. Stat. § 8C-1, Rule 401 (2019).

A. Standard of Review

¶ 35 "Although the trial court's rulings on relevancy technically are not discretionary and therefore are not reviewed under the abuse of discretion standard applicable to Rule 403, such rulings are given great deference on appeal." *Dunn v. Custer*, 162 N.C. App. 259, 266, 591 S.E.2d 11, 17 (2004) (citation and quotation marks omitted).

> Evidence casting doubt on the guilt of the accused and insinuating the guilt of another must be relevant in order to be considered by the jury. Because the relevancy standard in criminal cases is relatively lax, [a]ny evidence calculated to throw light upon the crime charged should be admitted by the trial court. However, the general rule remains that the trial court has great discretion on the admission of evidence. Evidence that another committed the crime for which the defendant is charged generally is relevant and admissible as long as it does more than create an inference or conjecture in this regard. Rather, it must point directly to the guilt of the other party. *The evidence must simultaneously implicate another and exculpate the defendant.*

State v. Miles, 222 N.C. App. 593, 607, 730 S.E.2d 816, 827 (2012) (emphasis supplied) (citations and internal quotation marks omitted) *aff'd*, 366 N.C. 503, 750 S.E.2d 833 (2013).

B. Trial Court's Findings

¶ 36 The trial court found:

> [S]ome items, specifically, a .25 caliber handgun and latex gloves were found somewhere relevant to Ashley Phillips.
>
> That also Ashley Phillips and others were seen arriving at the police department in a vehicle that has been forecasted to the Court to be similar to an automobile that was identified by a confidential informant as being in or around the scene of the murder of Ms. Feimster on March 24, 2016 (sic.)

> Also evidence has been presented at trial to indicate that the two -- the black female and the Hispanic male that were in the apartment on the night of May 24, 2016, were in communication via telephone. One or both of those individuals were in communication via cell phone with other individuals asking questions such as, "Where are you? When are you going to be here," which would -- could create and could be seen as evidence of the involvement of other parties, which to this Court does not -- which to this Court means that there may have been other people involved --could very well have been other people involved at -- and one of those people could very, very well have been Ashley Phillips.
>
> . . . .
>
> [T]he evidence that the defense intends to proffer need to both point directly to the guilt of another person and be inconsistent with the defendant's guilt.
>
> I'm going to find that the proffered -- or the forecasted evidence and the arguments of counsel for the defense failed to meet that second prong. That is, that the evidence would be inconsistent with the guilt of the defendants, and, therefore, I'm going to grant the State's motion in limine to exclude questions or testimony regarding the guilt of another individual.

¶ 37 Neither Defendant proffered evidence tending to *both* implicate another person(s) *and* exculpate either Defendant. *Miles*, 222 N.C. App. at 607, 730 S.E.2d at 827 (emphasis supplied). The proffered evidence merely inferred another person may have been involved in, or assisted in committing the crimes.

¶ 38 Such inferences, if true, were not inconsistent with direct and eyewitness evidence of either Albarran or Abbitt's guilt. *Id.* Albarran failed to show the trial court's exclusion of the proffered evidence, as not relevant and not admissible, was prejudicial or reversible error. This argument is overruled.

V. Photographic Lineup

¶ 39 **[2]** Albarran alleges the photographic array lineup was unconstitutionally suggestive.

A. Standard of Review

¶ 40 The standard of review to challenge the denial of a motion to suppress a suggestive pretrial identification is whether the trial court's findings of fact are supported by competent evidence, and if the findings of fact support the conclusions of law, which are reviewed *de novo*. *State v. Malone*, 373 N.C. 134, 145, 833 S.E.2d 799, 786 (2019). This Court examines the totality of the circumstances to determine whether an identification procedure was unduly suggestive. *State v. Alvarez*, 168 N.C. App. 487, 495, 608 S.E.2d 371, 376 (2005).

¶ 41 "[A] trial court's evidentiary ruling on a pretrial motion [to suppress] is *not* sufficient to preserve the issue of admissibility for appeal unless a defendant renews the objection during trial." *State v. Oglesby*, 361 N.C. 550, 554, 648 S.E.2d 819, 821 (2007) (emphasis original) (citations omitted). Where this issue is not properly preserved at trial, we review for plain error. *State v. Williams*, 248 N.C. App. 112, 118, 786 S.E.2d 419, 424 (2016).

¶ 42 Under plain error review, a defendant must show a fundamental error occurred at trial and that, after reviewing the entire record, the claimed error must be so prejudicial justice cannot have been done. *State v. Young*, 248 N.C. App. 815, 823, 790 S.E.2d 182, 188 (2016) (citation omitted). Albarran must show "the error had a probable impact on the jury's finding" and verdict that the defendant was guilty. *Id.* (citations, quotation marks, and brackets omitted).

B. Analysis

¶ 43 Albarran filed a pretrial motion to suppress the photographic lineup, which the trial court denied. During trial, Albarran objected to testimony about the pretrial identification process, but he failed to object to Gregory's testimony when she identified him as the Hispanic male perpetrator in the courtroom. The issue was not properly preserved for appellant review and is subject to plain error review. *State v. Houser*, 239 N.C. App. 410, 419, 768 S.E.2d 626, 633, *cert. denied*, 368 N.C. 281, 775 S.E.2d 869 (2015).

¶ 44 Albarran argues the photograph of him was substantially different from the other six photographs in the lineup. He asserts the photo was closer to his face than the others and drew attention to him.

¶ 45 "[T]he jury shall be instructed that it may consider credible evidence of compliance or noncompliance to determine the reliability of eyewitness identification." N.C. Gen. Stat. § 15A-284.52(d)(3) (2019). This

instruction was provided to the jury by the trial court pursuant to N.C.P.I. - - Crim. 101.15 (2019).

¶ 46 Gregory's courtroom identification of Albarran was of independent origin, based upon what she had experienced and saw up to and at the time of the shooting and during trial. Albarran failed to object, and his statutory and due process rights were not violated. *State v. Malone*, 373 N.C. 134, 135, 833 S.E.2d 779, 781 (2019) (holding eyewitness testimony identifying the defendant in trial after a prejudicial photo lineup was ultimately not a constitutional violation of his rights because the identification "was of independent origin").

¶ 47 Any uncertainty regarding the accuracy, abilities, or credibility of a witness' in-court identification testimony was subject to cross-examination. Any challenge goes to the weight and credibility the trier of fact should consider, rather than to its admissibility. *State v. Billups*, 301 N.C. 607, 616, 272 S.E.2d 842, 849 (1981).

¶ 48 Under plain error review, Albarran has failed to show that the alleged error had a probable impact on the jury. He has failed to establish the error is one that seriously affects the fairness, integrity, or public reputation of judicial proceedings or that a different outcome would have occurred, if excluded. With the unobjected to and in-court identification, the photo identification testimony is not shown to have impacted the jury's verdict. Albarran has failed to establish any prejudice. His argument is overruled.

VI. Failure to Present an Evidence Objection

¶ 49 **[3]** Where the trial court fails to sustain a defendant's objection to the prosecutor's improper closing argument, this Court reviews that ruling for abuse of discretion. *State v. Martin*, 248 N.C. App. 84, 88-89, 786 S.E.2d 426, 429 (2016) (citing *State v. Jones*, 355 N.C. 117, 131, 558 S.E.2d 97, 106 (2002).

A. Standard of Review

¶ 50 "Abuse of discretion results where the court's ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *Martin*, 248 N.C. App. at 89, 786 S.E.2d at 429 (internal citations omitted). "When applying the abuse of discretion standard to closing arguments, this Court first determines if the remarks were improper. . . . [I]mproper remarks include statements of personal opinion, personal conclusions, name-calling, and references to events and circumstances outside the evidence, such as the infamous acts of others." *Jones*, 355 N.C. at 131, 558 S.E.2d at 106. This Court also

"determine[s] if the remarks were of such a magnitude that their inclusion prejudiced defendant, and thus should have been excluded by the trial court." *Id.*

B. Analysis

¶ 51 Albarran argues the trial court erred by overruling his objection during the State's closing argument to the prosecutor's improperly commenting on his failure to present evidence. The State's closing argument asserted:

> [Prosecutor]: All right . . . . "Where is it?"
>
> [Defense Counsel]: Objection.
>
> THE COURT: Overruled.
>
> [Prosecutor]: The defense has suggested that value can be found in the evidence . . . in the Salisbury PD evidence locker that has not undergone forensic analysis. They can have the evidence analyzed. Why didn't they have the evidence analyzed? Where is their forensic analysis -- analyst? Again, where is it? Defendant Abbitt gave Sergeant Shulenburger a list of people who would corroborate that she was home all night on May 24 -- 25, 2016. Her attorney predicted in her opening statement that you would hear alibi evidence. Where are these alibi witnesses? And why haven't you heard from them?

¶ 52 Defense counsel objected, stating "we're getting dangerously close to potentially presenting antagonistic defenses." The trial court overruled the defenses' objections, but then stated, "Mr. Albarran did not represent to the jury that he had an alibi defense."

¶ 53 "The State is free to point out the failure of the defendants to produce available witnesses." *State v. Tilley*, 292 N.C. 132, 144, 232 S.E.2d 433, 441 (1977) (prosecutor's remarks directed at the failure of defendants to produce exculpatory evidence or to contradict the State's case did not constitute an impermissible comment on the failure of defendants to take the stand). Abbitt's counsel filed a pretrial notice to assert an alibi defense.

¶ 54 Under these facts relating to Abbitt, the prosecutor's remarks pointing out her failure to produce exculpatory evidence are not impermissible. *State v. Mason*, 315 N.C. 724, 732-33, 340 S.E.2d 430, 435-36 (1986). Here, the prosecutor's statements do not rise to the level of an

improper remark according to *Jones*, 355 N.C. at 131, 558 S.E.2d at 106. Defendant's argument is without merit and overruled. *Id.*

VII. Defendant's Closing Argument

¶ 55 **[4]** When the trial court fails to sustain a defendant's objection to the prosecutor's improper closing argument, this Court reviews that ruling for an abuse of discretion. *Martin*, 248 N.C. App. at 88-89, 786 S.E.2d at 429. "Abuse of discretion results where the court's ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *Id.* at 89, 786 S.E.2d at 429 (internal citation omitted).

¶ 56 As noted in the standard of review for section VI, "A lawyer may, however, urge the jury to observe and consider a defendant's demeanor during trial." *State v. Salmon*, 140 N.C. App. 567, 575, 537 S.E.2d 829, 835 (2000) (referencing the defendant in his closing, the prosecutor stated, "[h]ave you seen the slightest bit of emotion? . . . . I haven't seen any. He is a cold fish. He's the kind of individual, when you think about it, you see, who would do exactly what the evidence shows he did.").

¶ 57 Here, the defense's closing argument was as follows:

> [Defense counsel]: [Gregory] was asked about whether or not she noticed any tattoos on the person -- on the individual that she saw in the apartment -- the Hispanic male -- that night. And she said she didn't notice any tattoos. You've had a – a chance to see Daniel Albarran in the courtroom this week - -
>
> [Prosecutor]: Objection, Your Honor.
>
> THE COURT: Sustained.
>
> [Defense counsel]: You have been in this courtroom the entire week. You've had a chance to observe the demeanor of Daniel Albarran, his appearance because you - -
>
> [Prosecutor]: Objection, Your Honor.
>
> THE COURT: Sustained.
>
> [Defense counsel]: -- you obviously have had the opportunity sitting in this courtroom to see Daniel Albarran and to compare his appearance with the description that you've [heard] sic.

> [Prosecutor]: Objection, Your Honor.
>
> THE COURT: Sustained.
>
> [Defense counsel]: All right. You heard Detective Shulenburger - - Sergeant Shulenburger testify that the date Daniel Albarran was arrested, he came out of the bedroom putting his shirt on and that had numerous tattoos. He even had tattoos on his neck, and yet Ms. Gregory didn't mention tattoos in her description.

¶ 58 Defense counsel's closing argument asked the jury to discern what Albarran's appearance may have been two years earlier, and to contrast it with what his appearance was at trial, and in his lineup photo.

¶ 59 The prosecutor stated:

> [Prosecutor]: And I'll just state for the record, I don't have any problem with his demeanor or whatever. And I didn't have any problem with her asking about tattoos the defendant had at the time. The problem is the tattoos that he may have now, two and half years later.
>
> There's no evidence of what tattoos he had then and what tattoos he has now. It's certainly appropriate for her to comment on tattoos that were observed by Sergeant Shulenburger at the time, and that's the reason I objected, Your Honor.

¶ 60 Gregory testified Albarran wore a long-sleeve white shirt and jacket on the night of Feimster's murder, and if he had tattoos on his arms, she would not have been able to see them. The evidence tends to show the photographic lineup of both Albarran and Abbitt was held on 27 May 2016, three days after Feimster was murdered.

¶ 61 Defendants' trial began 4 March 2019, more than two years after the murder. Albarran's photograph used in the array and in the record does not show visible tattoos on Albarran's face and neck.

¶ 62 A change in Albarran's appearance over two years, or even three months, has no bearing on Gregory's identification and description of Albarran on the night of the murder. Based upon the lack of any visible tattoos in Albarran's photograph, shown to Gregory three days after the murder, the trial court did not abuse its discretion sustaining the prosecution's objections. Albarran's argument is overruled.

VIII. Abbitt's Out of Court Denials

¶ 63 **[5]** Abbitt argues her out-of-court statements denying she had seen Feimster recently were improperly placed into evidence as admissions. " 'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." N.C. Gen. Stat. § 8C-1, Rule 801(c) (2019). "However, out-of-court statements offered for purposes other than to prove the truth of the matter asserted are not considered hearsay." *State v. Call*, 349 N.C. 382, 409, 508 S.E.2d. 496, 513 (1998). "This Court has held that statements of one person to another to explain subsequent actions taken by the person to whom the statement was made are admissible as non-hearsay evidence." *Id.*

¶ 64 Sergeant Travis testified about a conversation he had with Abbitt, wherein she stated that she had not been to the Crown Point Drive area in over a year, had not seen Feimster in years, she had only known Feimster through Abbitt's sister, she did not know a Hispanic male who goes by the street name of "L.A.," and denied knowing Daniel Albarran at all.

¶ 65 Sergeant Travis testified Abbitt was not in custody or under arrest at the time of this conversation. He had advised Abbitt she did not have to talk to him and was free to leave at any time. After being advised that she could leave at any time, Abbitt willingly spoke to him.

¶ 66 The statements would be relevant and admissible pursuant to N.C. Gen. Stat. § 8C-1, Rule 401 (2019). These statements did not give rise to a reasonable possibility that without the asserted error, the jury would have reached a different result. Defendant's arguments are without merit and overruled.

IX. Elements of First-Degree Murder against Abbitt

¶ 67 **[6]** Abbitt argues her indictment is fatally defective because it does not sufficiently allege the essential elements of the offense. We disagree.

¶ 68 Our Supreme Court stated:

> [T]his Court has consistently held that indictments for murder based on the short-form indictment statute are in compliance with both the North Carolina and United States Constitutions.
>
> This Court has also held that the short-form indictment is sufficient to charge first-degree murder on the basis of any of the theories, including premeditation

> and deliberation, set forth in N.C.G.S. § 14-17, which is referenced on the short-form indictment.
>
> The crime of first-degree murder and the accompanying maximum penalty of death, as set forth in N.C.G.S. § 14-17 and North Carolina's capital sentencing statute, are encompassed within the language of the short-form indictment. We, therefore, conclude that premeditation and deliberation need not be separately alleged in the short-form indictment.

State v. Braxton, 352 N.C. 158, 174-175, 531 S.E.2d 428, 437-38 (2000) (alterations, citations and internal quotation marks omitted). The short form indictment is sufficient to confer jurisdiction upon the courts. *Id.* Abbitt's argument is overruled.

X. Conclusion

¶ 69 Defendants were properly prohibited from presenting evidence implicating a third party upon mere speculation, and which evidence did not exculpate their guilt. Albarran did not properly preserve his pretrial objection to the photo lineup on appeal by Gregory's unobjected to in-court identification of him. Defendants' objections during the prosecutor's closing arguments were neither meritorious nor prejudicial. The trial court did not err in sustaining the prosecutor's objections to Albarran's closing argument on his visible tattoos the time of trial.

¶ 70 Abbitt's out-of-court statements were not hearsay. They were relevant and properly admitted. Abbitt's challenge to her indictment is without merit. Both Defendants received fair trials, free from prejudicial errors they together or individually preserved and argued. We find no error. *It is so ordered.*

NO ERROR.

Judge JACKSON concurs.

Judge MURPHY dissents in part and concurs in part with separate opinion.

MURPHY, Judge, dissenting in part and concurring in part.

¶ 71 Evidence implicating others is relevant and admissible when it simultaneously implicates another and exculpates a defendant. Defendants sought to provide such evidence that implicated another person and

exculpated themselves. The proffered evidence "constitute[d] a possible alternative explanation for the victim's unfortunate demise and thereby cast[ed] crucial doubt upon the State's theory of the case." *State v. McElrath*, 322 N.C. 1, 13-14, 366 S.E.2d 442, 449 (1988). The trial court erred in precluding Defendants from introducing evidence implicating other suspects.

¶ 72 Further, a "reasonable possibility [exists] that, had the error in question not been committed, a different result would have been reached." *State v. Miles*, 222 N.C. App. 593, 607, 730 S.E.2d 816, 827 (2012), *aff'd per curiam*, 366 N.C. 503, 750 S.E.2d 833 (2013). Defendants are entitled to a new trial, which would render the issues discussed in Parts V through VIII of the Majority moot. As to the validity of the short form indictment discussed in Part IX, I concur.

BACKGROUND

¶ 73 During the investigation, two suspects other than Defendants were identified—Ashley Phillips and Tim Tim McCain. Phillips is a black woman.[1] Feimster's family initially identified Phillips as a possible suspect, and a confidential informant "stated that he did know that [Feimster's] family was trying to pin the murder on . . . this girl because [she and Feimster were] already beefing." When shown a photograph of Phillips, which was not in a photographic lineup, Gregory stated, "she does look like [the woman who shot Feimster]." Law enforcement investigated Phillips as a suspect, and a confidential informant identified a car, consistent with Phillips' car, at the apartment complex on the day of the murder. When the police searched Phillips' car, they found a .25 caliber Lorcin pistol, and latex gloves inside her car. This combination of items was consistent with Gregory's testimony that the man who participated in Feimster's murder was wearing latex gloves, as well as with her testimony regarding the small size of the gun used to murder Feimster.

¶ 74 Additionally, according to a Salisbury Police Department *Case Supplemental Report*, a confidential informant told law enforcement they saw McCain "at the apartment complex minutes before the murder." The confidential informant stated McCain "was wearing two big coats, was carrying a large looking pistol, and was trying to conceal his face with a white tshirt." This information was consistent with Gregory's tes-

1. McCain's race was not identified by the confidential informant in the police report regarding McCain's involvement in the murder. The trial court referenced the report and stated that the informant "says . . . [h]e saw a black male identified as Tim Tim McCain at the apartment complex minutes before the murder." However, the report only mentions "a black female" and does not mention McCain's race.

timony that the man who participated in Feimster's murder was wearing a work jacket and a white t-shirt, and her prior statement to an officer at the hospital that the Hispanic man had a gun.[2] Furthermore, according to the report, McCain saw the informant looking at him but McCain kept walking. The informant implied McCain was with a black woman in a car, which was consistent with Phillips' car. The informant also stated McCain "didn't kill the victim[,] but the [woman] did"; "[McCain] had to call the [woman] to do it because he had been seen." This information was also consistent with Gregory's testimony that a black woman shot Feimster, and was accompanied by a Hispanic man.

¶ 75 Based on this information, Defendants intended to present evidence that Phillips and McCain committed the crime. However, on 7 March 2019, the State filed a *Motion in Limine to Preclude Mention of Possible Guilt of Another*. Over Defendants' objections, the trial court granted the State's motion in limine to exclude questions or testimony regarding the guilt of another. In granting the State's motion in limine to exclude questions or testimony regarding the guilt of other individuals, the trial court found:

> [S]ome items, specifically, a .25 caliber handgun and latex gloves were found somewhere relevant to Ashley Phillips.
>
> That also Ashley Phillips and others were seen arriving at the police department in a vehicle that has been forecasted to the Court to be similar to an automobile that was identified by a confidential informant as being in or around the scene of the murder of Ms. Feimster on [24 May 2016].
>
> Also evidence has been presented at trial to indicate that the two -- the black female and the Hispanic male that were in the apartment on the night of [24 May 2016], were in communication via telephone. One or both of those individuals were in communication via cell phone with other individuals asking questions such as, "Where are you? When are you going to be here," which would -- could create and could be seen as evidence of the involvement of other parties, which to this Court does not -- which to this Court means

2. At trial, contrary to her statement to the officer at the hospital that the Hispanic man had a gun in the apartment the night of Feimster's murder, Gregory testified that she could not remember whether the Hispanic man had a gun.

> that there may have been other people involved --could very well have been other people involved at -- and one of those people could very, very well have been Ashley Phillips.

¶ 76 Throughout the trial, over Defendants' objections, the trial court precluded the presentation of evidence of other suspects implicated in the murder of Feimster. Without hearing such potentially exculpatory evidence, the jury found Abbitt guilty of first-degree murder on the basis of both premeditation and deliberation and felony murder, attempted robbery with a dangerous weapon, and assault with a deadly weapon, and the jury found Albarran guilty of first-degree murder on the basis of felony murder, attempted robbery with a dangerous weapon, and assault with a deadly weapon.

¶ 77 Defendants argue the trial court erred in prohibiting them from offering evidence of the guilt of Phillips and McCain, as evidence regarding whether they were even at Feimster's apartment on the night of the murder was exculpatory.

ANALYSIS

¶ 78 Relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." N.C.G.S. § 8C-1, Rule 401 (2019). "The admissibility of evidence is governed by a threshold inquiry into its relevance. In order to be relevant, the evidence must have a logical tendency to prove any fact that is of consequence in the case being litigated." *State v. Holmes*, 263 N.C. App. 289, 302, 822 S.E.2d 708, 720 (2018), *disc. rev. denied*, 372 N.C. 97, 824 S.E.2d 415 (2019). "Trial court rulings on relevancy technically are not discretionary." *Id.* "Whether evidence is relevant is a question of law, [and] we review the trial court's admission of the evidence *de novo*." *State v. Kirby*, 206 N.C. App. 446, 456, 697 S.E.2d 496, 503 (2010). Even though we review relevancy rulings de novo, we give the trial court rulings regarding whether evidence is relevant "great deference on appeal." *State v. Allen*, 265 N.C. App. 480, 489-90, 828 S.E.2d 562, 570, *disc. rev. denied*, *appeal dismissed*, 373 N.C. 175, 833 S.E.2d 806 (2019).

¶ 79 The Majority correctly sets out the rule regarding relevant evidence implicating others:

> Evidence casting doubt on the guilt of the accused and *insinuating* the guilt of another must be relevant in order to be considered by the jury. Because

> the relevancy standard in criminal cases is "relatively lax," *any evidence* calculated to throw light upon the crime charged should be admitted by the trial court. However, the general rule remains that the trial court has great discretion on the admission of evidence. Evidence that another committed the crime for which the defendant is charged *generally is relevant and admissible* as long as it does more than create an inference or conjecture in this regard. Rather, it must point directly to the guilt of the other party. The evidence must simultaneously implicate another and exculpate the defendant.

Miles, 222 N.C. App. at 607, 730 S.E.2d at 827 (emphases added) (citations and marks omitted); *supra* at ¶ 35. In *Miles*, we differentiated prior cases, "where alternate perpetrators were positively identified and both direct and circumstantial evidence demonstrated the third parties' opportunity and means to murder," from the defendant's speculative hypothetical that a third party only needed to "step outside her home to murder her husband." *Id.* at 608, 730 S.E.2d at 827. Such a speculative hypothetical did not amount to sufficient evidence to insinuate the guilt of another. *Id.* at 608-09, 730 S.E.2d at 827-28.

¶ 80 While the Majority correctly identifies the rule regarding relevant evidence implicating others, I disagree with its analysis and conclusion that the evidence proffered by Defendants should not have been admitted. The Majority cites the trial court's findings and concludes "[n]either Defendant proffered evidence tending to *both* implicate another person(s) *and* exculpate either Defendant." *Supra* at ¶ 37. According to the Majority, the inferences from the evidence regarding Phillips and McCain were not inconsistent with evidence of either Albarran or Abbitt's guilt. *Supra* at ¶¶ 37-38 ("The proffered evidence merely inferred another person may have been involved in, or assisted in committing the crimes. Such inferences, if true, were not inconsistent with direct and eyewitness evidence of either Albarran or Abbitt's guilt."). I could not disagree more.

¶ 81 The evidence Defendants offered regarding the guilt of others was highly relevant regarding the possibility of mistaken identification of who was actually in the apartment on the night of Feimster's murder. Specifically, Gregory's statement that Phillips looked like the woman in the apartment and the similarity between the informant's description of McCain and Gregory's description of the man in the apartment, in conjunction with the evidence placing McCain and Phillips at the scene of

the crime and evidence implicating McCain and Phillips that was consistent with Gregory's description of the murder, had the potential to cast doubt regarding whether Abbitt or Albarran were the male and female intruders in Feimster's apartment on the night of the murder.

¶ 82 There was strong evidence to inculpate Phillips. In addition to Feimster's family identifying Phillips as a suspect first, Gregory's statement that "[Phillips' picture] does look like [the woman who shot Feimster]," which was not included in a photographic lineup, is highly relevant. The confidential informant implied McCain was with the woman who shot Feimster. When asked specifically whether Phillips, among two others, had anything to do with the murder, the informant responded negatively regarding the two other people, but told the police he "couldn't advise about [whether Phillips was the woman he saw]." If Phillips was the black woman in the apartment on the night of Feimster's murder, and there was only one female intruder, such evidence would directly exculpate Abbitt. Additionally, other evidence implicated Phillips in Feimster's murder and aligned with Gregory's testimony regarding the small size of the gun and use of gloves. A confidential informant identified a vehicle consistent with Phillips' vehicle at the scene of the crime on the day of the murder, and a .25 caliber Lorcin pistol and latex gloves were discovered inside Phillips' vehicle. Further, Gregory testified the Hispanic man "had on latex gloves[.]"

¶ 83 Gregory's statement regarding Phillips looking like the woman who killed her daughter, and Feimster's family's suspicion of Phillips, taken with the other evidence found in Phillips' vehicle and the informant's statements in the police report, raises more than a mere inference that Phillips may have been involved in Feimster's murder. Rather, it "constitute[s] a possible alternative explanation for the victim's unfortunate demise and thereby casts crucial doubt upon the State's theory of the case." *McElrath*, 322 N.C. at 13-14, 366 S.E.2d at 449. This evidence was not only relevant, but pointed directly to the guilt of Phillips while exculpating Abbitt. *See Miles*, 222 N.C. App. at 607, 730 S.E.2d at 827.

¶ 84 The case of *State v. Israel* further undermines the Majority's reasoning. *State v. Israel*, 353 N.C. 211, 539 S.E.2d 633 (2000). In *Israel*, "the jury was not permitted to hear" evidence from the defendant regarding the victim's fear of her ex-boyfriend, as well as evidence the ex-boyfriend had been seen at the victim's apartment complex "twice during the *week* of the murder." *Id.* at 215, 539 S.E.2d at 636 (emphasis added). Our Supreme Court reasoned:

> [The ex-boyfriend] had both the opportunity to kill her—pictured as he was on the surveillance videotape

> entering and leaving the victim's apartment [within a day of the estimated time of death]—and, given his history with the victim, a possible motive. . . . [A]mple evidence supported [the defendant's] recent interaction with the victim. Equally ample was excluded evidence of [the victim's ex-boyfriend's] own recent interaction with [the victim], and the history of his dealings with her point to more sinister motives than any left behind in [the] defendant's fingerprints or personal effects.

Id. at 219, 539 S.E.2d at 638.

¶ 85 The offered evidence similarly placed Phillips at the scene of the crime as the confidential informant indicated Phillips' vehicle was at the apartment complex "minutes before the murder" and that a black woman was with McCain.[3] While the offered evidence regarding Phillips does not provide a specific motive, the victim's family's suspicion of Phillips as a suspect, as well as the informant's statement that the female with McCain was "already beefing" with Feimster, could have provided a potential motive for Phillips to harm Feimster, similar to the ex-boyfriend in *Israel*. The informant's statements in the report potentially places Phillips at the scene of the crime at a time more proximate to the crime than the ex-boyfriend in *Israel* and casts doubt on the accuracy of Gregory's testimony.

¶ 86 Further, Gregory claimed she was not shown a picture of Phillips, in the photographic lineup or otherwise. However, Defendants intended to offer evidence that Gregory initially identified Phillips as looking like the woman in the apartment on the night of the murder to impeach Gregory's recollection of the individuals in the apartment on the night of the murder. The trial court prevented Defendants from presenting evidence that would have fit the exact definition of impeachment regarding Gregory's testimony. "The primary purpose of impeachment is to reduce or discount the credibility of a witness for the purpose of inducing the jury to give less weight to his testimony in arriving at the ultimate facts in the case." *State v. Bell*, 249 N.C. 379, 381, 106 S.E.2d 495, 498 (1959) (quoting *State v. Nelson*, 200 N.C. 69, 72, 156 S.E. 154, 156 (1930)). "Impeachment evidence has been defined as evidence used to undermine a witness's credibility, with any circumstance tending to show a defect in the witness's perception, memory, narration or veracity relevant to this

3. Although the informant's statement explicitly referenced McCain, it clearly contemplated the woman McCain was with at the apartment at the same time as McCain.

purpose." *State v. Gettys*, 243 N.C. App. 590, 595, 777 S.E.2d 351, 356 (2015) (quoting *State v. Allen*, 222 N.C. App. 707, 721, 731 S.E.2d 510, 520, *disc. rev. denied*, *appeal dismissed*, 366 N.C. 415, 737 S.E.2d 377 (2012), *cert. denied*, 569 U.S. 952, 185 L. Ed. 2d 876 (2013)), *disc. rev. denied*, *appeal dismissed*, 368 N.C. 685, 781 S.E.2d 798 (2016). As Defendants argued at trial, the proffered evidence, "in the jury's eye[,] [had the potential to] call into question the reliability of the description[s] that [at] different times were given by Ms. Gregory." Consequently, the evidence implicating Phillips was also relevant to impeach Gregory's testimony or cause the jury to question her testimony at trial.

¶ 87 The trial court's exclusion of this evidence significantly curtailed both Defendants' cases. The State built its case on the fact that if one Defendant was guilty, the other was guilty.[4] For example, the State introduced evidence of Defendants' cell phone records, showing they had been in contact the day of the crime. However, if Defendants were able to introduce evidence that Phillips was the black woman in the apartment on the night of the murder, thus exculpating Abbitt, this would have also weakened the State's case that Albarran was the Hispanic man in the apartment on the night of Feimster's murder.[5]

> '[T]he twofold aim of criminal justice is that guilt shall not escape or innocence suffer.' We have elected to employ an adversary system of criminal justice in which the parties contest all issues before a court of law. The need to develop all relevant facts in the adversary system is both fundamental and comprehensive. The ends of criminal justice would be defeated if judgments were to be founded on a partial or speculative presentation of the facts. The very integrity of the judicial system and public confidence in the system depend on full disclosure of all the facts, within the framework of the rules of evidence.

United States v. Nixon, 418 U.S. 683, 709, 41 L. Ed. 2d 1039, 1064 (1974) (quoting *Berger v. United States*, 295 U.S. 78, 88, 79 L. Ed. 1314, 1321

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4. In response to the State's motion in limine seeking to exclude evidence regarding the possible guilt of another, Albarran acknowledged the State's tactic in arguing that the State's case was "if one is guilty[,] the other is guilty."

5. For instance, if Phillips was the black woman in the apartment on the night of the murder, and not Abbitt, Albarran was not the Hispanic man in the apartment. Additionally, if McCain was in the apartment that night, and not Albarran, then Abbitt was not the black woman in the apartment that night.

(1935), *overruled on other grounds by Stirone v. United States*, 361 U.S. 212, 4 L. Ed. 2d 252 (1960)). Defendants' proffered evidence was of great consequence to the pursuit of the truth as to who killed Feimster.

¶ 88 Albarran also desired to introduce evidence that someone else, namely McCain, may have committed the crimes. The confidential informant implied that McCain was at the apartment complex with a black woman minutes before the murder. Consistent with Gregory's testimony, the informant said McCain did not kill Feimster, but the black woman with McCain did. The informant also stated McCain was wearing "two big coats," "was trying to conceal his face with a white tshirt," and was carrying a gun. Similar to the informant's statement, Gregory described the man as wearing a white t-shirt, latex gloves, and a work jacket, and as carrying a gun.

¶ 89 In granting the State's motion in limine, the trial court stated "I don't see that this confidential informant [who identified McCain and a black woman at the apartment] provides any information that would make me reconsider my ruling." The trial court, and now the Majority, have not properly considered the relevancy of the evidence that implicated others, exculpated Albarran and Abbitt, and further impeached Gregory. In *Israel*, the victim's ex-boyfriend was seen at the victim's apartment complex "twice during the *week* of the murder." *Israel*, 353 N.C. at 215, 539 S.E.2d at 636 (emphasis added). Here, McCain was seen at the apartment complex with a gun *minutes* before the murder.[6]

¶ 90 Additionally, Gregory's initial identification of Phillips as looking like the woman in the apartment on the night of Feimster's murder, and the other evidence implicating Phillips, similarly undermines Gregory's

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6. I note our Supreme Court's opinion in *State v. Williams*, where the defendant sought to introduce evidence that three others may have committed the murders he was accused of. *State v. Williams*, 355 N.C. 501, 532, 565 S.E.2d 609, 627 (2002), *cert. denied*, 537 U.S. 1125, 154 L. Ed. 2d 808 (2003). In rejecting the defendant's arguments, our Supreme Court held "there was no evidence to indicate that [the first suspect] had committed this crime except for his proximity to the crime scene." *Id.* at 533, 565 S.E.2d at 628. Here, McCain was not only in close proximity to the crime scene, within minutes of the murder, but additional evidence indicated he committed the crime. The informant stated McCain was seen with a gun, two coats, a white t-shirt (trying to conceal his face from identification), and implied he was with a black woman in a car that matched Phillips' car. Similarly, Gregory described the man in the apartment on the night of the murder to be wearing a work jacket and a white t-shirt, and to be carrying a gun. Consistent with Gregory's testimony, the informant stated McCain did not kill the victim; rather, the woman did at McCain's request. Accordingly, McCain was not only in close proximity to the crime, like the suspect in *Williams*, but Defendants were also prepared to offer additional evidence indicating McCain committed the crime.

identification of Albarran, as Gregory may have also been mistaken about Albarran, rather than McCain, being in the apartment that night. Defendants had the right to impeach by offering evidence of Gregory's prior inconsistent statements or dishonesty. *See State v. Anderson*, 88 N.C. App. 545, 548, 364 S.E.2d 163, 165 (1988) (marks and citation omitted) ("[I]mpeachment is an attack upon the credibility of a witness, and is accomplished by such methods as showing the existence of bias; a prior inconsistent statement; untruthful or dishonest character; or defective ability to observe, remember, or recount the matter about which the witness testifies.").

¶ 91 The trial court concluded that Defendants' evidence merely implicated the involvement of other parties, making any evidence regarding McCain and Phillips not exculpatory, because one or both of the Defendants was talking on the phone asking questions, including, "Where are you? When are you going to be here[?]" The Record lacks evidence linking the four–Phillips and McCain with Abbitt and Albarran–by phone or otherwise. The trial court's grant of the State's motion in limine excluded the evidence underlying Defendants' key exculpatory theory of mistaken identification, and instead assumed a connection between Defendants and any other potential perpetrators, without sufficient evidentiary support. The evidence of other suspects had the potential to negate Defendants' involvement in the crime if the intrusion into Feimster's apartment and her murder were committed by Phillips and/or McCain.

¶ 92 The following evidence was potentially exculpatory to Abbitt: Gregory's statement that Phillips looked like the person who shot Feimster; the discovery of a potential murder weapon and latex gloves consistent with the crime in Phillips' car; a car consistent with Phillips' car being at the scene of the crime; and the report that a woman with McCain committed the murder. This evidence points to one black female intruder, Phillips, in Feimster's apartment that night, which would exculpate Abbitt from Feimster's murder. The following evidence was potentially exculpatory to Albarran: an informant placing McCain at the apartment complex minutes before the murder; the consistent identification of a male in a white t-shirt and coat with latex gloves; and the connection of McCain with Phillips in conjunction with the evidence inculpating Phillips. This evidence also points to one male intruder, McCain, in Feimster's apartment that night, which would exculpate Albarran from Feimster's murder. Consequently, the trial court erred in precluding Defendants from introducing such evidence.

¶ 93 "When the trial court excludes evidence based on its relevancy, a defendant is entitled to a new trial only where the erroneous exclusion was prejudicial." *Miles*, 222 N.C. App. at 607, 730 S.E.2d at 827. "A defendant is prejudiced by the trial court's evidentiary error where there is a 'reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial out of which the appeal arises.' " *Id.* (quoting N.C.G.S. § 15A-1443(a) (2011)). "[The] [d]efendant bears the burden of showing prejudice." *Id.* Here, Defendants have shown a reasonable possibility that the jury would have reached a different result if the trial court had admitted the evidence implicating Phillips and McCain, as this evidence would have exculpated Defendants and the only evidence directly connecting Defendants to the crime was Gregory's identification of them, which would have been undermined by her impeachment.

CONCLUSION

¶ 94 Defendants sought to introduce exculpatory evidence regarding the involvement of two different suspects in the murder of Feimster. This relevant evidence simultaneously implicated others and exculpated Defendants. Further, it impeached the State's key witness. The trial court should not have granted the State's motion in limine to exclude questions or testimony regarding the guilt of another, and, had the trial court's evidentiary error not occurred, a different result was reasonably possible. Defendants are entitled to a new trial, and, other than the validity of the short form indictment, the remaining issues on appeal are moot. I respectfully dissent.

STATE OF NORTH CAROLINA
v.
GABRIEL LYNN BURNS

No. COA20-491

Filed 3 August 2021

Sexual Offenses—with a child—penetration—touching urethral opening

There was sufficient evidence of penetration to support defendant's convictions for statutory sex offense with a child under thirteen by an adult where the victim testified that defendant touched her urethral opening with his fingers.

Appeal by Defendant from judgment entered 25 January 2019 by Judge Eric C. Morgan in Forsyth County Superior Court. Heard in the Court of Appeals 8 June 2021.

Attorney General Joshua H. Stein, by Assistant Attorney General Amber I. Davis, for the State.

Michael E. Casterline, for Defendant-Appellant.

WOOD, Judge.

¶ 1 On January 25, 2019, a Forsyth County jury convicted Gabriel Burns ("Defendant") of four charges of statutory sex offense with a child under thirteen by an adult and sixteen charges of indecent liberties with a minor. On appeal, Defendant contends there is insufficient evidence to support his convictions for statutory sex offense because there was no evidence of penetration. After careful review, we find no error.

I. Background

¶ 2 Ms. B is the mother of two daughters. Ms. B began dating Defendant in the summer of 2016, when Hannah,[1] Ms. B's youngest child, was eight years old. By October 2016, Ms. B and Hannah were living with Defendant in his house. At the time, Defendant worked as a mechanic and Ms. B was unemployed.

1. *See* N.C. R. App. P. 42(b) (pseudonyms are used to protect the identity of the juveniles).

¶ 3 Prior to moving into Defendant's home with Ms. B and Defendant, Hannah lived with Ms. L, her maternal grandmother, and attended Kimmel Farms Elementary School in Winston-Salem. After moving into Defendant's home, Hannah was no longer in the school zone for Kimmel Farms Elementary School. In order to keep Hannah in the same school, Ms. B arranged for Defendant to drive Hannah from his home to Ms. L's house each morning on his way to work so Hannah could ride the school bus to Kimmel Farms Elementary School. Defendant also picked Hannah up from Ms. L's house about three evenings per week to take her back to his house.

¶ 4 At first, Defendant dropped Hannah off at Ms. L's house each morning and she went inside to wait for the bus. After approximately a month, Defendant began parking his car outside Ms. L's home and keeping Hannah in the car with him until the bus arrived. Defendant parked in front of Ms. L's house, in a spot where his car could be seen from inside Ms. L's house. After some time of doing this, Defendant started parking in a spot where it was more difficult to see his car from inside Ms. L's home.

¶ 5 Following Hannah's move to Defendant's home, her behavior began to change. Hannah started having difficulty going to sleep, and Ms. B had to call Ms. L to calm Hannah down. On March 9, 2017, Hannah told Ms. L that Defendant had been touching her "down there" in the car on the way to and from Ms. L's house. Hannah told Ms. L she could "take it no more." She alleged Defendant was also touching her at his house when Ms. B was not in the room.

¶ 6 Ms. L took Hannah to the Department of Social Services, where they spoke to a social worker. Later that evening, at the request of the social worker, Ms. L took Hannah to a local hospital where she received a sexual assault examination. That same night, Defendant agreed to allow hospital personnel to collect evidence for a sexual assault kit from him. He also allowed police to examine his minivan.

¶ 7 On April 12, 2017, Hannah received a child medical examination. A recorded forensic interview was also conducted with her that day. Defendant agreed to be interviewed by police on May 25, 2017. On June 2, 2017, another recorded interview with Hannah was conducted by a police detective to ensure the detective "understood everything in order, and the dates, and times, and locations" of the alleged assaults because "how [Hannah] was touched . . . had already been covered." Defendant was arrested on June 15, 2017. On September 25, 2017, Defendant was indicted on four charges of statutory sex offense with a child under thirteen by an adult and sixteen charges of indecent liberties with a minor.

His trial in the Forsyth County Superior Court lasted from January 14, 2019, until January 25, 2019.

¶ 8 During the State's evidence, an eleven-year-old Hannah testified that, for months, beginning when she was eight years old, Defendant rubbed his fingers "in circles" on her vagina and was "messing" with her by touching her vagina both in his car and at his home. When asked at trial about where Defendant was placing his fingers, Hannah testified it was on her vagina "where I wipe at" and Defendant rubbed his fingers on the "place where I pee." Hannah also clarified that nothing had ever gone "inside" her vagina.

¶ 9 After the State rested, Defendant's attorney moved to dismiss the charges. The trial court denied the motion. Defendant testified and denied that the allegations Hannah made against him were true, specifically denying that he touched Hannah inappropriately.

¶ 10 The jury convicted Defendant of all charges on January 25, 2019. Defendant gave oral notice of appeal in open court.

II. Discussion

¶ 11 In his sole argument on appeal, Defendant contends there was insufficient evidence to support his convictions for statutory sex offense because the State failed to present sufficient evidence of penetration. We disagree.

¶ 12 We review whether the State presented evidence sufficient to survive a motion to dismiss *de novo*. *State v. Bagley*, 183 N.C. App. 514, 523, 644 S.E.2d 615, 621 (2007). "Under a *de novo* review, [this] [C]ourt considers the matter anew and freely substitutes its own judgment for that of the lower tribunal." *State v. Williams*, 362 N.C. 628, 632, 669 S.E.2d 290, 294 (2008) (internal quotation marks omitted). "When determining the sufficiency of the evidence to support a charged offense, [this Court] must view the evidence 'in the light most favorable to the State, giving the State the benefit of all reasonable inferences.' " *State v. Trull*, 349 N.C. 428, 447, 509 S.E.2d 178, 191 (1998) (quoting *State v. Benson*, 331 N.C. 537, 544, 417 S.E.2d 756, 761 (1992)). Furthermore, "[a] defendant's motion to dismiss must be denied if the evidence considered in the light most favorable to the State permits a rational jury to find beyond a reasonable doubt the existence of each element of the charged crime and that defendant was the perpetrator." *State v. Campbell*, 359 N.C. 644, 681, 617 S.E.2d 1, 56 (2005) (quoting *Trull*, 349 N.C. at 447, 509 S.E.2d at 191).

¶ 13 "On a defendant's motion for dismissal on the ground of insufficiency of the evidence, the trial court must determine only whether

there is substantial evidence of each essential element of the offense charged and of the defendant being the perpetrator of the offense." *State v. Crawford*, 344 N.C. 65, 73, 472 S.E.2d 920, 925, (1996). "Substantial evidence is relevant evidence that a reasonable mind might accept as adequate to support a conclusion." *Id.*

¶ 14 Under N.C. Gen. Stat. § 14-27.28(a), "[a] person is guilty of statutory sexual offense with a child by an adult if the person is at least 18 years of age and engages in a sexual act with a victim who is a child under the age of 13 years." N.C. Gen. Stat. § 14-27.28(a) (2021). In North Carolina, a sexual act is defined, *inter alia*, by "the penetration, however slight, by any object into the genital or anal opening of another person's body." N.C. Gen. Stat. § 14-27.20(4) (2021).

¶ 15 In the present appeal, Defendant concedes he is an adult over the age of eighteen, and Hannah was between eight and nine years old when the alleged sexual contact occurred. Therefore, the only element in dispute is the element of penetration. *See* N.C. Gen. Stat. § 14-27.28(a); *see also* N.C. Gen. Stat. § 14-27.20(4).

¶ 16 This Court addressed the penetration element of our first-degree sexual offense charge in *State v. Bellamy*, 172 N.C. App. 649, 617 S.E.2d 81 (2005). In *Bellamy*, while committing an armed robbery of a fast-food restaurant, the defendant held a woman at gunpoint and forced her to remove her pants and underwear. *Bellamy*, 172 N.C. App. at 654, 617 S.E.2d at 86. The defendant then ordered his victim to spread her labia apart so that he could touch and separate it further with the barrel of his gun. *Id.* Though the defendant had no further sexual contact with the victim, this Court affirmed the defendant's conviction, reasoning that there was no rationale for deviating from its precedent that penetrating a victim's labia constitutes a sexual act sufficient to establish the penetration element of the first-degree sexual offense charge. *Id.* at 658, 617 S.E.2d at 88.

¶ 17 Here, while there is no evidence Defendant inserted his fingers into Hannah's vagina, there is sufficient evidence he penetrated her labia by rubbing his fingers in circles on her vulva. Specifically, Hannah confirmed that though Defendant's fingers did not go "inside" her vagina, his fingers did touch "on my vagina where I wipe at" and "on the place where I pee." The small opening where a female urinates is her urethral opening, which is located within the labia minora, below the clitoris and above the vaginal opening.[2] Accordingly, in order to touch the urethral

2. The urethral opening is the "external opening of the transport tube that leads from the bladder to discharge urine outside the body in a female." The opening "of the female

opening from which a female urinates, the labia majora and labia minora almost certainly have to be entered like that of the victim's in *Bellamy*. Thus, in order for Defendant's fingers to have touched Hannah's urethral opening, his fingers had to have been within Hannah's labia.

¶ 18 This Court has concluded that a victim's testimony of being touched in between the labia is sufficient evidence to survive a motion to dismiss by the defendant. For example, in *State v. Corbett*, the defendant contended on appeal the State provided no evidence of penetration constituting a sexual act as defined by N.C. Gen. Stat. § 14-27.20(4), despite the victim's testimony that she was touched "in between the labia" by the defendant. 264 N.C. App. 93, 96, 824 S.E.2d 875, 879 (2019). In that case, this Court held the victim's testimony, when viewed in the light most favorable to the State, was sufficient so that reasonable jurors could have determined that it constituted substantial evidence to establish the element of penetration in the offense charged. *Id.* at 99, 824 S.E.2d at 879. In doing so, we reasoned that since evidence of penetrating the labia is sufficient to establish the element of penetration in a sexual act, the victim's testimony she was touched "in between the labia" was sufficient to establish the element in the defendant's rape charge. *Id.* at 98-99, 824 S.E.2d at 878-79 (citing *Bellamy*, 172 N.C. App. at 658, 617 S.E.2d at 88).

¶ 19 Here, the State's evidence consisted of testimony from Hannah, Ms. L, Hannah's uncle, and Hannah's therapist. The State's witnesses all testified Defendant touched Hannah "in [her] vagina," "down there," and "in her private areas," and had his hands "inside [Hannah's] panties, rubbing up and down." The State, in the present appeal, presented sufficient evidence by offering the victim's testimony that she was touched by Defendant and corroborating testimony from Ms. L, Hannah's uncle, and Hannah's therapist who she confided in regarding the abuse. *See Corbett*, 264 N.C. App. at 99, 824 S.E.2d at 879 (finding that victim testimony, alone, is sufficient evidence of the element of penetration). Thus, we hold the State presented substantial evidence supporting the element of penetration from which reasonable jurors could have concluded Defendant committed first-degree sex offense. Accordingly, we find no error.

NO ERROR.

Chief Judge STROUD and Judge COLLINS concur.

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urethra is below the clitoris and just above the opening of the vagina." https://www.medicinenet.com/female_urethral_opening/definition.htm.

STATE v. DOVER

[278 N.C. App.723, 2021-NCCOA-405]

STATE OF NORTH CAROLINA
v.
DAVID MYRON DOVER, DEFENDANT

No. COA20-362

Filed 3 August 2021

Homicide—sufficiency of evidence—opportunity to commit crime —surmise and conjecture

There was insufficient evidence to convict defendant of robbery with a dangerous weapon, felony murder based on the underlying felony of robbery with a dangerous weapon, and first-degree murder based on malice, premeditation, and deliberation where defendant was a crack cocaine addict who had frequently borrowed cash from the victim, the victim had been known to carry large sums of cash, defendant had approximately $3,000 of cash in a concealed location after the murder, cell phone tower records showed that defendant was in the vicinity of the victim's residence on the night of the murder (a sector that also included defendant's place of work), defendant made contradictory statements to the police, and defendant had deleted all of the call and text message history from his phone up until the morning that the victim's body was found. While the circumstantial evidence showed that defendant had an opportunity to commit the crimes charged, it did not remove the case from the realm of surmise and conjecture.

Judge ARROWOOD dissenting.

Appeal by Defendant from judgments entered 19 September 2019 by Judge Richard S. Gottlieb in Rowan County Superior Court. Heard in the Court of Appeals 9 February 2021.

Attorney General Joshua H. Stein, by Special Deputy Attorney General K. D. Sturgis, for the State.

Marilyn G. Ozer for defendant-appellant.

MURPHY, Judge.

¶ 1 When the State presents evidence that raises a strong suspicion of a defendant's guilt, but does not remove the case from the realm of

surmise and conjecture, the trial court errs in denying the defendant's motion to dismiss for insufficiency of the evidence. Here, the circumstantial evidence presented at trial showed Defendant had an opportunity to commit the crime charged, but there was not evidence, even when viewed in the light most favorable to the State, that a reasonable mind could accept to support the conclusion that Defendant robbed and murdered the victim.

BACKGROUND

¶ 2 On 16 May 2016, Defendant David Myron Dover was indicted on one count of robbery with a dangerous weapon, one count of first-degree murder, and having attained the status of habitual felon. A jury was impaneled for Defendant's trial on 9 September 2019. The evidence at trial tended to show the following:

¶ 3 On the morning of 10 May 2016, Arthur "Buddy" Davis ("Mr. Davis") was scheduled to meet one of his daughters, April Anderson, at 7:00 a.m. to give her an unknown sum of money. When he did not show up, Anderson called Mr. Davis's place of employment, Terry's Auto Sales, and asked to "speak to Buddy[.]" Anderson was told Mr. Davis was not at work.

¶ 4 Anderson then called her sister, Charlotte Davis ("Davis"), who directed her husband, Waylon Barber, to go to Mr. Davis's mobile home in Kannapolis to check on him. Contemporaneously, the owner of Terry's Auto Sales, Terry Bunn, was concerned about Mr. Davis not showing up at work and decided to go to Mr. Davis's mobile home to check on him. Bunn arrived at the mobile home before Barber and, after knocking on the door and receiving no answer, "slid [a screwdriver] in behind the door . . . [and] jimmied the door open." Bunn entered the home, called Mr. Davis's name, and observed "something [that] had a real brown look to it" in the kitchen, which he realized was blood. Bunn then walked to the bedroom, where he found Mr. Davis lying unconscious on the floor and called 911. Barber arrived shortly thereafter and also called 911. Paramedics arrived at the mobile home and declared Mr. Davis dead. According to expert testimony, the cause of Mr. Davis's death was multiple stab wounds. No evidence of forced entry into the mobile home was found. The time of Mr. Davis's death could not be determined with accuracy and a murder weapon was never identified.

¶ 5 Officers who responded to the 911 calls identified a list of possible suspects, including Defendant. Defendant lived in Rowan County and worked at Terry's Auto Sales with Mr. Davis. Due to a crack cocaine substance abuse problem, Defendant frequently borrowed small amounts

of cash from various people in the community, including Mr. Davis, and failed to pay them back.

¶ 6 After the investigation at Mr. Davis's mobile home concluded, some officers went to locate the other possible suspects. Contemporaneously, other officers went by Defendant's house, located in China Grove, "to kind of get a feel of where [he] lived at." As the officers were leaving the area, they saw Defendant "pull in, driving." The officers knew Defendant previously had his driver's license revoked and contacted the Rowan County Sheriff's Office to advise them Defendant was driving without a license. The Rowan County Sherriff's Office took out a warrant for Defendant for driving while license revoked, but service of the warrant was held off.

¶ 7 That same day, officers returned to Defendant's house. Defendant and his girlfriend, Carol Carlson, who Defendant lived with, came outside the house to speak with the officers. Defendant and Carlson agreed to let the officers search their house. As a result of the search, an officer seized two shirts and a pair of blue jeans located in the back bedroom of Defendant's house. According to the officer, these items were seized "[b]ecause they had blood stains or what appeared to be blood stains on the shirts and on the back of the blue jeans." Blood DNA tests were done comparing the blood stains on the clothing seized from Defendant's house and the blood at the scene of the crime with Defendant's blood and Mr. Davis's blood. Forensic biologists testified there was no connection between Defendant's DNA profile and the scene of the crime, and no connection between the blood stains on Defendant's clothes and Mr. Davis's DNA profile.

¶ 8 After the officers finished searching the house, Defendant agreed to go to the Kannapolis police department to talk about Mr. Davis's death. As they were leaving, Carlson asked Defendant for money because she was hungry, and Defendant gave her $20.00 from cash that he had in his pocket at the time.

¶ 9 Defendant's interview at the police department was video recorded and played for the jury. When asked about his whereabouts on the evening of 9 May 2016, Defendant stated he returned home at about 8:00 or 9:00 p.m. and did not leave his house for the remainder of the evening. Later during the interview, Defendant changed his story and stated that on 9 May 2016, he purchased "a dime" of crack cocaine, brought it back to Terry's Auto Sales, and smoked it before he did more work and later went home. He also stated he tried to call Mr. Davis two or three times to borrow $20.00 at about 10:00 p.m., but Mr. Davis never picked up the

phone. Defendant told the officers that occasionally, Mr. Davis tells him he isn't going to loan him any more money, but Mr. Davis recently loaned him $20.00 on the previous Sunday.

¶ 10 Defendant gave the interviewing officers permission to inspect his cell phone in an attempt to corroborate his story. Officers attempted to retrieve data from Defendant's cell phone using a Cellebrite forensic device, but due to the age of the phone, the data could not be retrieved. Instead, the officers manually searched the cell phone's contents. The manual search revealed the only calls in the cell phone's call history were those made after Defendant had been in the presence of the officers, and the only text message history was one text message received from Carlson on 10 May 2016.

¶ 11 The State also presented location records of Defendant's cell phone on the night of 9 May 2016. According to expert testimony from Special Agent Michael Sutton, Defendant's cell phone records were assessed to determine which cell towers and sectors were utilized by his phone in order to map its location. Because "[m]ost towers are sectorized to increase the number of customers it can serve[,]" cell phone carriers put "three towers on one pole, pointing in different directions." Special Agent Sutton looked at "the topography of the area, the layout of the area, as well as associating the other towers to come up with an estimated service area of [a] particular tower," and determined the general area and sector of where Defendant's phone was when it was being used.

¶ 12 The cell tower records showed Defendant made calls at 9:46 p.m., 10:21 p.m., 10:22 p.m., and 10:23 p.m. on 9 May 2016 from a sector that included his residence in China Grove. The cell tower records also showed Defendant made calls at 11:22 p.m., 11:30 p.m., 11:31 p.m., and 11:32 p.m. on 9 May 2016 from a sector that included both Mr. Davis's mobile home and Terry's Auto Sales. On 10 May 2016, the cell tower records showed Defendant made calls at 12:00 a.m., 12:11 a.m., and 12:12 a.m. from a sector that included the home of Defendant's drug dealer. Also, on 10 May 2016, Defendant again made calls between 12:49 a.m. and 1:29 a.m. from the sector that included his residence in China Grove.

¶ 13 Officers asked Defendant where he obtained the money he gave to Carlson prior to the interview. He stated he had $300.00 or $400.00 from a customer whose car he put a transmission in, but it was Bunn's money since Bunn gave him an advance on the money Defendant was to receive for the transmission work.

¶ 14 After the interview concluded, Defendant went outside the Kannapolis Police Department and waited to be transported back to his

house. While waiting, Defendant was arrested on the outstanding warrant for driving while license revoked. Defendant was transported to jail where he declined to be interviewed a second time.

¶ 15 While in jail, Defendant made a telephone call to Carlson on a monitored phone line. The audio recording of this phone call was played for the jury. While on the phone, Defendant instructed Carlson to look in a trash can for a stack of approximately $3,000.00 in cash, inside a work glove, which was in turn inside a McDonald's bag, and instructed her to use the cash to pay his bail. Carlson located the money and used $1,000.00 of it for Defendant's bail money. Officers recovered the remainder of the money, $1,724.00, from a wallet in Carlson's purse. The majority of the cash was in one-hundred-dollar bills. Officers were later able to recover the McDonald's bag and the empty work glove inside of it from a garbage can across the street from Defendant's house, at Carlson's mother's house.

¶ 16 At the close of the State's evidence, Defendant made a motion to dismiss all charges "for failure to provide evidence as to each element of each crime[.]" The trial court denied the motion to dismiss. At the close of all evidence, Defendant renewed the motion to dismiss all charges, citing "insufficiency of the evidence" as the basis for the motion. The trial court denied the renewed motion.

¶ 17 During closing arguments, the State argued to the jury:

> Admittedly, we don't have DNA in this case. We don't. There's always going to be something you can look at in a crime scene investigation and say it wasn't done. Short of us literally picking up the entire trailer and moving [it to] a warehouse and going through it with microscopes, there's always going to be something you can point out that wasn't done. We do the reasonable things, the things that lead to evidence that we believe might produce evidence. One way or the other, we're going to run down your alibi, just like we run down allegations against you, and that was done in this case, time and time again. The problem is, every time they went to check on something that [Defendant] had told them, it was a lie. And everybody else was telling the truth. Everything checked out. But nothing he had to say checked out, and he's telling you ridiculous things. Ridiculous.

> You need a reasonable explanation for that money. If you don't have a reasonable explanation for where that money came from --

Defendant then objected and the trial court sustained the objection; however, the trial court did not give a curative instruction. After the conclusion of the State's closing argument, Defendant moved for a mistrial based on the lack of a curative instruction. The trial court denied the motion.

¶ 18 The jury found Defendant guilty of felony murder, based on the underlying felony of robbery with a dangerous weapon, and first-degree murder on the basis of malice, premeditation, and deliberation. The jury also found Defendant guilty of robbery with a dangerous weapon. The trial court sentenced Defendant to life without parole on the first-degree murder conviction and arrested judgment on the robbery with a dangerous weapon conviction. Defendant timely appealed.

ANALYSIS

¶ 19 On appeal, Defendant argues the trial court erred by (A) denying his motion to dismiss all the charges for insufficiency of the evidence, and (B) denying his motion for a mistrial when the trial court failed to give a curative instruction during the prosecutor's improper closing statement. We agree with Defendant that the trial court erred by denying his motion to dismiss all the charges and vacate his convictions.

A. Motion to Dismiss

¶ 20 "This Court reviews the trial court's denial of a motion to dismiss *de novo*." *State v. Smith*, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007). "When reviewing a defendant's motion to dismiss for insufficient evidence, [we] must inquire whether there is substantial evidence of each essential element of the crime and that the defendant is the perpetrator." *State v. Campbell*, 373 N.C. 216, 220, 835 S.E.2d 844, 848 (2019) (marks omitted). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Smith*, 186 N.C. App. at 62, 650 S.E.2d at 33.

¶ 21 However, "[i]f the evidence is sufficient only to raise a suspicion or conjecture as to either the commission of the offense or the identity of the defendant as the perpetrator of it, the motion [to dismiss] should be allowed." *State v. Powell*, 299 N.C. 95, 98, 261 S.E.2d 114, 117 (1980). This is true even if "the suspicion so aroused by the evidence is strong." *Id.* "In making its determination, the trial court must consider all evidence admitted, whether competent or incompetent, in the light most favor-

able to the State, giving the State the benefit of every reasonable inference and resolving any contradictions in its favor." *State v. Rose*, 339 N.C. 172, 192, 451 S.E.2d 211, 223 (1994), *cert. denied*, 515 U.S. 1135, 132 L. Ed. 2d 818 (1995).

¶ 22 We begin by noting the evidence we rely on to analyze the murder charges is the same evidence we rely on to analyze the robbery with a dangerous weapon charge. As such, we discuss the sufficiency of the evidence presented for the first-degree murder charge, the felony murder charge, and the robbery with a dangerous weapon charge together. We hold the evidence, even when viewed in the light most favorable to the State, was insufficient to go to the jury.

¶ 23 Defendant argues "[t]he State failed to present any evidence that [Defendant] entered the trailer of [Mr. Davis] and committed murder" and "[t]he State failed to present any evidence connecting [the $3,000.00 in cash] with [the victim]."

¶ 24 The State contends there was evidence presented that "a reasonable mind might accept as adequate to support [the] conclusion" that Defendant murdered and robbed Mr. Davis. *Smith*, 186 N.C. App. at 62, 650 S.E.2d at 33. The evidence favorable to the State included: Defendant lied to the police and changed his story as to his whereabouts on the night of the murder; cell tower records placed Defendant in the same vicinity as Mr. Davis's mobile home on the night of the murder;[1] Defendant deleted his cellphone call and text messaging history; there was no forced entry in Mr. Davis's mobile home, suggesting he knew the perpetrator; the fact that Defendant was in possession of $3,000.00 in cash with no explanation of where it came from; Mr. Davis's wallet and any cash he may have had were missing from his mobile home; Bunn's testimony that Mr. Davis usually "carried a lot of cash on him" and kept cash in his wallet; Mr. Davis planned to meet his daughter the morning after the murder to bring her money; Defendant's continued asking to borrow money from Mr. Davis; and Mr. Davis told Defendant a few days before his death he refused to loan Defendant any more money. The State's evidence in this case establishes Mr. Davis was murdered, and "[i]t shows that [Defendant] had the opportunity to commit it and begets suspicion in imaginative minds. All the evidence engenders the question, if [D]efendant didn't kill [the victim], who did? To raise such a question,

1. We note that while the State's evidence shows that Defendant may have been in the general vicinity of the victim's mobile home, this general vicinity also overlaps with Terry's Auto Sales, Defendant's employer, and a location where Defendant is often present.

however, will not suffice to sustain a conviction." *State v. Jones*, 280 N.C. 60, 66, 184 S.E.2d 862, 866 (1971) (marks and citations omitted).

¶ 25 The State urges we can infer Defendant's motive for murdering Mr. Davis was because Mr. Davis "has been known to carry around large amounts of cash" and Defendant was in possession of a large amount of cash immediately after the murder. In light of Mr. Davis's scheduled meeting with his daughter on 10 May 2016 where he planned to give her money, the jury could reasonably infer Mr. Davis had cash in his mobile home. However, it is too speculative to assume Mr. Davis had thousands of dollars' worth of one-hundred-dollar bills when there is nothing in the Record to support this assumption, especially considering the Record contains no indication that Mr. Davis ever loaned anyone more than $20.00 or $50.00. Assuming Mr. Davis possessed a large amount of cash at the time of his murder, the State failed to present sufficient evidence that Defendant was the one who took and carried away the cash from the victim. Rather, the evidence simply established that Defendant had an opportunity to steal the money at issue. "Under well-settled caselaw, evidence of a defendant's mere opportunity to commit a crime is not sufficient to send the charge to the jury." *Campbell*, 373 N.C. at 221, 835 S.E.2d at 848.

¶ 26 *State v. White* illustrates the principle that a conviction cannot be sustained if the most the State has shown is the defendant was in an area where he could have committed the crime. *State v. White*, 293 N.C. 91, 235 S.E.2d 55 (1977). In *White*, the defendant was charged with second-degree murder after a woman was found stabbed to death in her mobile home located outside of a motel where the defendant was staying at the time. *Id.* at 96-97, 235 S.E.2d at 59. There was testimony that a motel employee heard a woman scream and then saw a man run out of the victim's mobile home and head in the direction of the defendant's motel room. *Id.* at 92, 235 S.E.2d at 56. Officers found traces of blood on the defendant's shoes and shirt, but the DNA analysis failed to match the blood to the victim. *Id.* at 96, 235 S.E.2d at 59. Our Supreme Court held that, although "the evidence raises a strong suspicion as to [the] defendant's guilt[,]" it was "not sufficient to remove the case from the realm of surmise and conjecture." *Id.* at 95, 235 S.E.2d at 58. Our Supreme Court acknowledged the State's evidence established that the defendant was in the general vicinity of the victim's residence at the time of the murder, the defendant gave contradictory statements to law enforcement officers, and it could "even reasonably be inferred that the defendant was at the home of the deceased when the deceased came to her death, or shortly thereafter." *Id.* at 97, 235 S.E.2d at 59. Nevertheless, our Supreme Court reversed the defendant's conviction. *Id.*

¶ 27 Here, the State offered evidence that the victim "has been known to carry around large amounts of cash"; the victim planned to bring money to his daughter on the morning he was found murdered, although it is unknown how much money; Defendant was a crack cocaine addict who frequently borrowed small amounts of money from various people in the community, including the victim; Defendant was in possession of approximately $3,000.00 in cash after the murder and concealed that cash outside his girlfriend's mother's house; Defendant was in the vicinity of the victim's residence for a period of time on the night of the murder; Defendant changed his story and gave contradictory statements to law enforcement officers; and Defendant deleted all call and text message history from his cellphone except for the calls and text messages from the morning the victim was discovered murdered. This evidence may be fairly characterized as raising a suspicion of Defendant's guilt, but crucial gaps existed in the State's evidence. The State failed to link Defendant to the stolen cash or prove that the $3,000.00 worth of one-hundred-dollar bills Defendant hid in the McDonald's bag in the trash can was cash stolen from the victim's mobile home. "The full summary of the incriminating facts, taken in the strongest view of them adverse to [Defendant], excite[s] suspicion in the just mind that he is guilty, but such view is far from excluding the rational conclusion that some other unknown person may be the guilty party." *Jones*, 280 N.C. at 66, 184 S.E.2d at 866 (marks omitted).

¶ 28 "The State has shown that [] [D]efendant was in the general vicinity of the deceased's home at the time of the murder and that he made several arguably contradictory statements during the course of the police investigation." *White*, 293 N.C. at 97, 235 S.E.2d at 59. However, "the State has [only] established that [] [D]efendant had an opportunity to commit the crime charged." *Id.* To infer anything "[b]eyond that we must sail in a sea of conjecture and surmise. This we are not permitted to do." *Id.* There was no evidence beyond mere speculation that Defendant was at the scene of the crime, had a motive to commit these crimes, or that Defendant actually committed the crimes. Although "[t]he circumstances raise a strong suspicion of [D]efendant's guilt, . . . we are obliged to hold that the State failed to offer substantial evidence that [D]efendant was the one who [stabbed the victim]." *Jones*, 280 N.C. at 67, 184 S.E.2d at 866. There is insufficient evidence to establish Defendant was the perpetrator of the murder and the robbery.

¶ 29 "We believe the evidence raises a strong suspicion as to [D]efendant's guilt, but that is not sufficient to remove the case from the realm of surmise and conjecture." *White*, 293 N.C. at 95, 235 S.E.2d at

58. We find the Record is insufficient to show more than a suspicion that Defendant murdered Mr. Davis and robbed him with a dangerous weapon. "Because there was insufficient evidence to support the commission of the underlying felony, there is also insufficient evidence to support [D]efendant's conviction of felony murder." *State v. Bates*, 309 N.C. 528, 535, 308 S.E.2d 258, 263 (1983). The trial court erred in denying Defendant's motion to dismiss all charges and we reverse the trial court's ruling on the motion to dismiss and vacate his convictions.

B. Motion for a Mistrial

¶ 30 Defendant also argues "the [trial] court erred by failing to promptly cure the prosecutor's improper [closing] argument which shifted the burden of proof to [] Defendant" and the trial court should have granted his motion for a mistrial. Our holding in Part A–that the trial court erred in denying Defendant's motion to dismiss all charges–renders Defendant's second argument, regarding his motion for a mistrial, moot. *See State v. Angram*, 270 N.C. App. 82, 88, 839 S.E.2d 865, 869 (2020) ("Because we must reverse the judgment, we need not address [the] defendant's other issue on appeal."). As we agree with Defendant's first argument, we must reverse the trial court's ruling on the motion to dismiss all charges, as well as vacate Defendant's judgments, and we need not address Defendant's other issue on appeal.

CONCLUSION

¶ 31 The State failed to present substantial evidence that Defendant was the perpetrator of any of the crimes he was tried upon. The trial court erred in denying Defendant's motion to dismiss all charges. We reverse its ruling and vacate Defendant's convictions.

REVERSED.

Judge DILLON concurs.

Judge ARROWOOD dissents with separate opinion.

ARROWOOD, Judge, dissenting.

¶ 32 I respectfully dissent from the majority's holding that the trial court erred in denying defendant's motion to dismiss for insufficient evidence. Although the majority's holding does not reach defendant's motion for a mistrial, I also would hold that the trial court properly denied defendant's motion. I would affirm the trial court's order and uphold defendant's convictions.

I. Motion to Dismiss for Insufficient Evidence

¶ 33 In ruling on a motion to dismiss, "the trial court need determine only whether there is substantial evidence of each essential element of the crime and that the defendant is the perpetrator." *State v. Winkler*, 368 N.C. 572, 574, 780 S.E.2d 824, 826 (2015) (internal quotation marks and citation omitted). Substantial evidence is defined by the North Carolina Supreme Court as "evidence which a reasonable mind could accept as adequate to support a conclusion." *State v. Lee*, 348 N.C. 474, 488, 501 S.E.2d 334, 343 (1998) (citing *State v. Vick*, 341 N.C. 569, 583-84, 461 S.E.2d 655, 663 (1995)). In reviewing the trial court's decision on appeal, the evidence must be viewed "in the light most favorable to the State, giving the State the benefit of all reasonable inferences." *State v. Barnes*, 334 N.C. 67, 75, 430 S.E.2d 914, 918 (1993) (citation omitted).

¶ 34 In order to be submitted to the jury for determination of defendant's guilt, the evidence "need only give rise to a reasonable inference of guilt." *State v. Turnage*, 362 N.C. 491, 494, 666 S.E.2d 753, 755 (2008) (citing *State v. Stone*, 323 N.C. 447, 452, 373 S.E.2d 430, 433 (1988)). This is true regardless of whether the evidence is direct or circumstantial. *State v. Trull*, 349 N.C. 428, 447, 509 S.E.2d 178, 191 (1998). If the court decides that a reasonable inference of the defendant's guilt may be drawn from the circumstances, then "it is for the jury to decide whether the facts, taken singly or in combination, satisfy them beyond a reasonable doubt that the defendant is actually guilty." *State v. Thomas*, 296 N.C. 236, 244, 250 S.E.2d 204, 209 (1978) (citation and emphasis omitted).

¶ 35 In considering circumstantial evidence, a jury may properly make inferences on inferences in determining the facts constituting the elements of the crime. *State v. Childress*, 321 N.C. 226, 232, 362 S.E.2d 263, 267 (1987). Making inferences which naturally arise from a fact proven by circumstantial evidence "is the way people often reason in everyday life." *Id.*

¶ 36 When ruling on a motion to dismiss, the only question for the trial court is whether "the evidence is sufficient to get the case to the jury; it should not be concerned with the weight of the evidence." *State v. Earnhardt*, 307 N.C. 62, 67, 296 S.E.2d 649, 652 (1982) (citing *State v. McNeil*, 280 N.C. 159, 162, 185 S.E.2d 156, 157 (1971)). If the evidence is sufficient only to raise a suspicion or conjecture as to either the commission of the offense or the identity of the defendant as the perpetrator, the motion to dismiss must be allowed. *State v. Malloy*, 309 N.C. 176, 179, 305 S.E.2d 718, 720 (1983) (citing *State v. Poole*, 285 N.C. 108, 203 S.E.2d 786 (1974)).

¶ 37 The majority accurately summarizes the evidence presented in this case, but I disagree with the majority's resulting analysis. In summarizing the evidence, the majority appears to engage in a determination of whether the facts, taken singly or in combination, were satisfactory beyond a reasonable doubt that defendant is actually guilty. With respect to defendant's motion to dismiss for insufficient evidence, the only question we must answer is whether there was evidence that gives rise to a reasonable inference of guilt.

¶ 38 The State presented evidence that the victim carried large amounts of cash on his person, he was due to bring money to his daughter on the morning he was found dead, and that a police search of his residence immediately after his murder revealed no cash or billfold. The State also presented evidence that defendant was a long-term crack cocaine user that frequently borrowed small amounts of cash from friends, his employer, and others, including the victim, and was in possession of nearly $3,000 in cash immediately after the victim's murder. Regarding this money, the State presented evidence that the cash was hidden in a glove, inside a McDonald's bag, inside his girlfriend's mother's outdoor trashcan, across the street from where defendant was staying, and that defendant had not been in possession of that money on several occasions prior to the victim's murder. Finally, the State presented evidence from defendant's cell phone records that defendant was in the vicinity of the victim's residence and another acquaintance's residence on the night he told police he had stayed at home, and that defendant had deleted all call and text histories apart from very recent calls and a text message from the morning the victim's body was discovered.

¶ 39 In this case, I would hold that the evidence of defendant's location, his possession of a large amount of cash, his history with the victim, and defendant's apparent concealment of evidence was sufficient to raise a reasonable inference that defendant was guilty of armed robbery and first-degree murder. Accordingly, I believe the case was properly submitted to the jury.

II. Motion for a Mistrial

¶ 40 "We review the trial court's denial of [d]efendant's motion for a mistrial for abuse of discretion." *State v. Sistler*, 218 N.C. App. 60, 70, 720 S.E.2d 809, 816 (2012). "Abuse of discretion results where the court's ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *State v. Hennis*, 323 N.C. 279, 285, 372 S.E.2d 523, 527 (1988). "In our review, we consider not whether we might disagree with the trial court, but whether the trial

court's actions are fairly supported by the record." *State v. Lasiter*, 361 N.C. 299, 302, 643 S.E.2d 909, 911 (2007).

¶ 41 "Where, immediately upon a defendant's objection to an improper remark made by the prosecutor in his closing argument, the trial court instructs the jury to disregard the offending statement, the impropriety is cured." *State v. Woods*, 307 N.C. 213, 222, 297 S.E.2d 574, 579 (1982). However, if a defendant fails to object to a prosecutor's closing argument at trial, this Court "must consider whether the argument was so grossly improper that the trial court erred by failing to intervene *ex mero motu*." *State v. Rogers*, 355 N.C. 420, 452, 562 S.E.2d 859, 879 (2002). The defendant's failure to meet the State's evidence is properly the subject of a prosecutor's closing argument. *Id.*

¶ 42 In this case, the State's closing argument addressed facts supported by competent evidence and suggested inferences based on those facts. The State argued, without objection, that "every time they went to check on something that the defendant had told them, it was a lie," and that none of defendant's accounts to police were verified. The State continued as follows:

> You need a reasonable explanation for that money. If you don't have a reasonable explanation for where that money came from –
>
> MR. HOFFMAN: Your Honor, I'm going to object.
>
> THE COURT: Hold on one second. Approach.
>
> (Counsel approached the bench.)
>
> THE COURT: Sustained.
>
> [STATE]: If you can't in your own mind, reasonably resolve where that money came from, he's guilty, period. In his world, there was no other place it could have come from.

Although defendant objected to the State's original phrasing, defendant failed to object to the following statement and now argues that the trial court should have issued a curative instruction, rather than simply sustaining the objection. Defendant additionally cites several cases to support the proposition that a jury charge cannot cure an error in closing argument and that a curative instruction must be prompt or immediate. I find this case distinguishable from those cited by defendant, as defendant did not object to the rephrased argument. Defendant has failed to show that the State's closing argument was so grossly improper

that the trial court had a duty to intervene *ex mero motu*. Accordingly, I would hold that the trial court properly denied defendant's motion for a mistrial.

STATE OF NORTH CAROLINA
v.
RAMON DAVAUL MALONE-BULLOCK

No. COA20-334

Filed 3 August 2021

1. Evidence—lay witness testimony—defendant's intent—prejudice analysis

The trial court erred in defendant's trial for first-degree murder by admitting impermissible lay witness opinion testimony, over defendant's objections, that defendant drove to his cousin's house in order to obtain a gun and that defendant later attempted to set up the cousin to be killed (because the cousin was cooperating with police in their investigation of defendant for the murder), where the jury was as well qualified as the witnesses to draw those inferences from the evidence. However, the errors in admitting these two statements were not prejudicial in light of the overwhelming evidence of defendant's guilt.

2. Constitutional Law—right against self-incrimination—statements made upon arrest—testimony about extent of statements

Where defendant chose not to remain silent when he was arrested for murder, the trial court did not err by allowing the prosecutor to ask a law enforcement officer about the difference between defendant's statement upon his arrest (that he did not shoot the victim and did not know who did) and defendant's theory of defense at trial (that defendant's cousin shot the victim).

Appeal by defendant from judgment entered 16 August 2019 by Judge Leonard L. Wiggins in Wilson County Superior Court. Heard in the Court of Appeals 9 June 2021.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Patrick S. Wooten, for the State.

Glover & Petersen, P.A., by James R. Glover, for defendant-appellant.

ZACHARY, Judge.

¶ 1 Defendant Ramon Davaul Malone-Bullock appeals from a judgment entered upon a jury's verdict finding him guilty of first-degree murder. On appeal, Defendant argues that the trial court erred by overruling Defendant's objections to lay-witness opinion testimony. Defendant also argues that the trial court committed plain error by permitting the State to elicit testimony from a detective regarding Defendant's post-arrest silence. While we agree that the trial court erred by overruling Defendant's objections to impermissible lay-witness opinion testimony, we conclude that the error did not prejudice Defendant. We further conclude that the trial court did not err by allowing the prosecutor to question the detective regarding Defendant's statements to law enforcement officers following his arrest. Therefore, after careful review, we conclude that Defendant received a trial free from prejudicial error.

I. Background

¶ 2 The State's witnesses at Defendant's trial testified to the following: On the afternoon of 1 April 2017, Defendant attended a child's birthday party on Lincoln Street in Wilson, North Carolina, with his girlfriend, Jatoria Grice, and his friend, Devanta Battle. After the birthday party was over, some of the attendees went down the street to the home of Veronika Locus and began to play cards. A dispute over the card game arose between Defendant and Harry Beecher, and they got into a fist-fight. Defendant told Mr. Beecher, "I'm going to kill you" and "you better not be here when I get back," and additionally threatened that "he was going to f*** him up[.]" Defendant then left with Ms. Grice in her car. Ms. Locus and Mr. Battle told Mr. Beecher to leave as well, but he did not.

¶ 3 When they left Ms. Locus's house, Defendant drove Ms. Grice's car; she testified that "[h]e drove really fast, like . . . 120" miles per hour, despite her request that he slow down. After Defendant ran a red light, Ms. Grice told him to stop the car. Defendant pulled over at a gas station, and Ms. Grice exited the car. Defendant drove off in the direction of his grandfather's house, where he was residing at the time.

¶ 4 Shortly thereafter, Defendant returned to Ms. Locus's house. When Mr. Beecher saw Defendant, Mr. Beecher repeatedly said, "I'm going to get him now." As Mr. Beecher started to walk toward Defendant, Defendant shot him and then left. Mr. Battle, Alex Umstead, and Elliot Santiago witnessed the shooting. Mr. Beecher died at the scene.

¶ 5 Defendant's cousin, William Saxton, testified for the State at Defendant's trial. He testified that on the morning of 1 April 2017, he

and Defendant used Mr. Saxton's gun to practice target shooting in the yard. Defendant asked if he could buy the gun from Mr. Saxton; Mr. Saxton refused, but allowed Defendant to borrow it. The gun had six bullets in the cartridge when Defendant took it. When Defendant returned the gun to Mr. Saxton the next day, 2 April 2017, the cartridge was empty.

¶ 6 Defendant's account at trial differed from that of the State's witnesses. In his opening statement, Defendant's counsel asserted that he "expect[ed] the evidence to be clear that William Saxton . . . pull[ed] the trigger on that gun that killed" Mr. Beecher. Defendant testified that, after letting Ms. Grice out of the car at the gas station, he drove to Mr. Saxton's home, which was near Defendant's residence. He told Mr. Saxton about the fight with Mr. Beecher, and Mr. Saxton "got real mad [that Mr. Beecher] put his hands on" Defendant. Mr. Saxton said, "I'm going to show you how to handle stuff." Defendant testified that Mr. Saxton dropped off Defendant at the home of someone named "Old School" with whom Defendant gambled until Mr. Saxton returned. Defendant then asked Mr. Saxton what happened, and Mr. Saxton responded that "he handled that and don't ask him all these crazy questions." Defendant testified that he did not shoot Mr. Beecher, and that his "gut" told him that Mr. Saxton did.

¶ 7 Defendant was arrested on 15 December 2017 on the charge of first-degree murder for the death of Mr. Beecher. When detectives spoke with Defendant upon his arrest, Defendant told them that he did not shoot Mr. Beecher and he did not know who did.

¶ 8 Mr. Battle testified at trial to circumstances after the shooting. In February of 2018, defense counsel received discovery from the State. The discovery included the videotape of a December 2017 interview of Mr. Saxton, in which he told law enforcement officers that he had lent Defendant his gun from 1 to 2 April 2017. Mr. Battle testified that Defendant phoned him in May 2018, after Defendant became aware of the Saxton videotape:

> Basically [Defendant] mad like. . . . [S]o I asked him like, Elliot [Santiago] told me about Saxton. He like, yeah, blah, blah, blah, Saxton ain't right. . . . He was like how you going to tell on me; you the one that gave him the gun. . . . I ain't got nothing to prove but I know it's him; like I know it's him, got to be him. That's what he kept saying; got to be him, bro, I need you.

Mr. Battle then testified that Defendant told him, "You need to get rid of Saxton[,]" which Mr. Battle understood to mean, "Kill him." Defendant and Mr. Battle then planned the killing of Mr. Saxton.

¶ 9 On 20 May 2018, Mr. Battle called Mr. Saxton and arranged a meeting. Mr. Battle picked up Mr. Saxton, with Mr. Battle's friend, Sabrina Presley, driving the car. Mr. Battle instructed her to turn onto a dead-end road and stop at a stop sign. When she did, Mr. Battle shot Mr. Saxton in the face. Mr. Saxton quickly exited the car and ran toward the woods; Mr. Battle jumped out after him and shot him again in the back. Mr. Saxton hid in the woods, and ultimately survived his injuries.

¶ 10 Afterward, Mr. Battle spoke to Defendant by phone again and told him, "boy got away, bro." Mr. Battle testified that Defendant sounded "disappointed" to hear this news.

¶ 11 On 16 July 2018, a Wilson County grand jury returned an indictment charging Defendant with first-degree murder in the death of Mr. Beecher. Following a trial, on 16 August 2019, the jury returned a verdict finding Defendant guilty of first-degree murder. The trial court entered judgment upon the verdict and sentenced Defendant to life imprisonment without the possibility of parole.

¶ 12 Defendant gave notice of appeal in open court.

II. Discussion

¶ 13 Defendant raises two arguments on appeal. First, Defendant argues that the trial court erred in denying his objections to two instances of improper lay-witness opinion testimony. Second, he argues that the trial court committed plain error by permitting the State to elicit testimony from Detective Justin Godwin regarding Defendant's post-arrest silence. We address each argument in turn. After careful review, we conclude that the trial court did not commit prejudicial error by allowing the lay-witness opinion testimony, and that the trial court did not err by permitting the State to question Det. Godwin regarding Defendant's statement upon his arrest.

A. Admission of Lay-Witness Opinion Testimony

¶ 14 **[1]** At trial, Mr. Battle testified, over Defendant's objection, that he believed that, after Defendant left Ms. Grice at the gas station, he was driving to Mr. Saxton's house because he knew that Mr. Saxton had guns. Defendant argues that the trial court erred by permitting Mr. Battle to testify to his opinion regarding where Defendant was driving or why.

¶ 15 In addition, Mr. Saxton testified, over Defendant's objection, that he believed that Defendant had set him up to be shot by Mr. Battle. Defendant argues that the trial court erred by permitting Mr. Saxton to speculate as to whether Defendant planned Mr. Saxton's shooting.

¶ 16 We agree that the trial court erred by admitting each of these lay-witness opinions; however, because the State presented ample other evidence upon which the jury could have relied in finding Defendant guilty of first-degree murder, we conclude that these errors were not prejudicial.

1. Standard of Review

¶ 17 Defendant objected to both Mr. Battle's and Mr. Saxton's testimony at trial; we therefore review the trial court's evidentiary rulings for abuse of discretion. *State v. Belk*, 201 N.C. App. 412, 417, 689 S.E.2d 439, 442 (2009), *disc. review denied*, 364 N.C. 129, 695 S.E.2d 761 (2010). "In determining whether a criminal defendant is prejudiced by the erroneous admission of evidence, the question is whether there is a reasonable possibility that, had the evidence not been admitted, the jury would have reached a different verdict." *State v. Shaw*, 106 N.C. App. 433, 441, 417 S.E.2d 262, 267, *disc. review denied*, 333 N.C. 170, 424 S.E.2d 914 (1992).

2. Analysis

¶ 18 Rule 701 of the North Carolina Rules of Evidence governs opinion testimony by lay witnesses:

> If the witness is not testifying as an expert, his testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of his testimony or the determination of a fact in issue.

N.C. Gen. Stat. § 8C-1, Rule 701 (2019).

¶ 19 Generally, "opinion evidence of a non-expert witness is inadmissible because it tends to invade the province of the jury." *State v. McKoy*, 2021-NCCOA-237, ¶ 14 (citation omitted). In that "the jury is charged with determining what inferences and conclusions are warranted by the evidence[,]" *id.* (citation omitted), lay-witness opinion testimony is inadmissible when the jury is "as well qualified as the witness to draw the inferences and conclusions from the facts that [the witness] expresse[s] in his opinion[,]" *Belk*, 201 N.C. App. at 415, 689 S.E.2d at 441 (citation omitted).

¶ 20 Our Supreme Court has interpreted Rule 701 to allow a lay witness to testify to an opinion which is "a shorthand statement of fact, or, in other words, the instantaneous conclusions of the mind as to the appearance, condition, or mental or physical state of persons, animals, and

things, derived from observation of a variety of facts presented to the senses at one and the same time[.]" *State v. Roache*, 358 N.C. 243, 294, 595 S.E.2d 381, 414 (2004) (citations and internal quotation marks omitted). However, "[a]lthough a lay witness may be allowed to testify as to his opinion of the emotions a person displayed on a given occasion, a lay witness may not give his opinion of another person's intention on a particular occasion." *State v. Hurst*, 127 N.C. App. 54, 63, 487 S.E.2d 846, 853, *appeal dismissed and disc. review denied*, 347 N.C. 406, 494 S.E.2d 427 (1997), *cert. denied*, 523 U.S. 1031, 140 L. Ed. 2d 486 (1998) (citation and internal quotation marks omitted).

¶ 21 Here, Mr. Battle testified on direct examination that he was with Ms. Locus at her house on the evening of 1 April 2017 when Ms. Locus received a telephone call from Ms. Grice, who said that Defendant was "driving fast" and "on the way to the country." Mr. Battle then testified as follows:

> Q Do you know where [Defendant] lived at that time?
>
> A Yes.
>
> Q Where?
>
> A In the country.
>
> Q Where in the country?
>
> A Out Packhouse.
>
> Q Now did you know William Saxton?
>
> A Yes.
>
> Q Did you know where he lived?
>
> A Yes.
>
> Q Where did he live?
>
> A Off Packhouse [Road].
>
> Q Is that near [Defendant]?
>
> A Yes. That's where I figured he was going.
>
> Q Why is that? Why did you figure he was going there?
>
> A Just the way she say he was driving and he was already mad so I figured he was going to see [Mr. Saxton].

> Q Why would he do that?
>
> [DEFENSE COUNSEL]: Objection. There's no foundation for his answer to this. He would be guessing, speculation.
>
> THE COURT: If he knows why he can answer the question. Objection is overruled.
>
> . . . .
>
> BY [COUNSEL FOR THE STATE]:
>
> Q Okay. Could you answer the question why he would be going there?
>
> A [Mr. Saxton] got all the guns.

¶ 22 Defendant contends that Mr. Battle's testimony that he "figured" that Defendant was driving to Mr. Saxton's house because Mr. Saxton had "all the guns" amounts to an impermissible opinion. We agree.

¶ 23 Here, the jury was "as well qualified as [Mr. Battle] to draw the inferences and conclusions from the facts[.]" *Belk*, 201 N.C. App. at 415, 689 S.E.2d at 441. The State presented testimony that Defendant and Mr. Saxton lived near each other; that Defendant was driving at a high rate of speed in the direction of their respective houses; that Defendant appeared angry after the altercation with Mr. Beecher; that Mr. Saxton had a gun; and that Defendant knew that Mr. Saxton had a gun. The State presented these facts prior to eliciting the opinion statement from Mr. Battle. Therefore, the jury was well equipped to draw the same inference that Mr. Battle had drawn: that Defendant was driving to Mr. Saxton's house to acquire a gun. Accordingly, the trial court erred by admitting Mr. Battle's opinion testimony.

¶ 24 We similarly conclude that the trial court erred by overruling Defendant's objection to Mr. Saxton's opinion testimony and permitting Mr. Saxton to testify that he believed that Defendant planned for Mr. Battle to shoot him.

¶ 25 Mr. Saxton testified regarding his opinion as to Defendant's complicity in his shooting:

> Q What was your thought when you were in the ambulance going to the hospital?
>
> A I was set up.
>
> Q By whom?

[DEFENSE COUNSEL]: Objection.

THE WITNESS: [Defendant].

THE COURT: Overruled.

BY [COUNSEL FOR THE STATE]:

Q By whom?

A [Defendant].

Q Why?

A About the shooting on Lincoln Street.

¶ 26 Mr. Saxton's testimony that he was "set up" by Defendant because of the shooting on Lincoln Street is an improper opinion. This testimony was not based on Mr. Saxton's perception, as is required by Rule 701, and he was in no better position than the jurors to deduce whether Defendant was responsible for Mr. Battle shooting him. *See State v. White*, 154 N.C. App. 598, 605, 572 S.E.2d 825, 831 (2002). "The jury is charged with drawing its own conclusions from the evidence, and without being influenced by the conclusion of [Mr. Saxton]. Therefore, we find the trial court erred in permitting this testimony." *Id.*

¶ 27 Nevertheless, we conclude that neither statement prejudiced Defendant. "In determining whether a criminal defendant is prejudiced by the erroneous admission of evidence, the question is whether there is a reasonable possibility that, had the evidence not been admitted, the jury would have reached a different verdict." *Shaw*, 106 N.C. App. at 441, 417 S.E.2d at 267. Defendant cannot show that the admission of Mr. Battle's or Mr. Saxton's opinion testimony prejudiced him. Three eyewitnesses testified that Defendant shot Mr. Beecher. The jury also heard testimony that Defendant threatened to kill Mr. Beecher, that he told Mr. Beecher that he had "better not be here" when Defendant returned, and that he borrowed Mr. Saxton's gun on the day of the shooting and returned it with an empty cartridge the following day. Additionally, Defendant himself testified—following the erroneous admission of the above testimony—that, after he left Ms. Grice at the gas station, he drove to Mr. Saxton's house. Therefore, Defendant cannot show "a reasonable possibility that, had the evidence not been admitted, the jury would have reached a different verdict." *Id.*

B. Post-Arrest Silence

¶ 28 **[2]** Defendant next argues that the trial court committed plain error by permitting the prosecutor to elicit testimony from Det. Godwin that

Defendant did not offer his version of the events—strongly implying that Mr. Saxton shot and killed Mr. Beecher—at any time between his arrest and trial. Defendant contends that the prosecutor's questioning impermissibly referenced his right not to incriminate himself under the Fifth Amendment to the United States Constitution. After careful review, we conclude that the trial court did not err in permitting this line of questioning because it did not, in fact, refer to any post-arrest silence on the part of Defendant.

1. Preservation

¶ 29 As a preliminary matter, the State, pointing to *State v. Gardner*, 68 N.C. App. 515, 316 S.E.2d 131 (1984), *aff'd*, 315 N.C. 444, 340 S.E.2d 701 (1986), argues that this issue is not appropriate for appellate review because it is an unpreserved constitutional issue. In *Gardner*, the defendant argued on appeal that cross-examination regarding his "failure to give a statement to the police after his arrest violated his constitutional right to remain silent." 68 N.C. App. at 518, 316 S.E.2d at 133. However, this Court concluded that, because the defendant neither asserted plain error on appeal nor raised a constitutional objection at trial, he waived appellate review of the alleged violation. *Id.* at 520, 316 S.E.2d at 133.

¶ 30 *Gardner* is not applicable in the instant case, in which Defendant has clearly asserted plain error; instead, our Supreme Court's decision in *State v. Moore*, 366 N.C. 100, 726 S.E.2d 168 (2012), governs where a defendant asserts that the trial court committed plain error in admitting testimony in violation of his constitutional right not to incriminate himself. In *Moore*, the defendant argued that the trial court committed plain error by admitting the testimony of a law enforcement officer that referred to the defendant's exercise of his Fifth Amendment right not to incriminate himself. 366 N.C. at 103, 726 S.E.2d at 171. The Court of Appeals concluded that the admission was error, but that it did not amount to plain error. *Id.* at 103–04, 726 S.E.2d at 171–72. The Supreme Court of North Carolina affirmed, concluding that the trial court erred in admitting the testimony that referred to the defendant's post-arrest silence, but that "the brief, passing nature" of the erroneously admitted evidence did not amount to plain error. *Id.* at 107, 726 S.E.2d at 174. In deciding that the admission of the officer's testimony was error but not plain error, the *Moore* Court noted that "[t]he prosecutor did not emphasize, capitalize on, or directly elicit [the officer's] prohibited responses; the prosecutor did not cross-examine [the] defendant about his silence; the jury heard the testimony of all witnesses, including [the] defendant; and the evidence against [the] defendant was substantial and corroborated by the witnesses." *Id.* at 109, 726 S.E.2d at 175.

¶ 31 Therefore, pursuant to our Supreme Court's analysis in *Moore*, the issue of whether the trial court committed plain error by admitting testimony regarding Defendant's post-arrest silence is properly before us.

2. Standard of Review

¶ 32 "For error to constitute plain error, a defendant must demonstrate that . . . . after examination of the entire record, the error had a probable impact on the jury's finding that the defendant was guilty." *State v. Lawrence*, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012) (citation and internal quotation marks omitted). Regarding the burden on criminal defendants under plain-error review, our Supreme Court has explained that

> [t]he plain error rule is always to be applied cautiously and only in the exceptional case where, after reviewing the entire record, it can be said the claimed error is a fundamental error, something so basic, so prejudicial, so lacking in its elements that justice cannot have been done, or where the error is grave error which amounts to a denial of a fundamental right of the accused, or the error has resulted in a miscarriage of justice or in the denial to [the] appellant of a fair trial or where the error is such as to seriously affect the fairness, integrity or public reputation of judicial proceedings or where it can be fairly said the instructional mistake had a probable impact on the jury's finding that the defendant was guilty.

Id. at 516–17, 723 S.E.2d at 333 (emphasis, citation, and internal quotation marks omitted).

3. Analysis

¶ 33 Defendant contends on appeal that the trial court committed plain error by permitting the prosecutor to question Det. Godwin regarding Defendant's failure to mention his belief that Mr. Saxton shot Mr. Beecher, maintaining that the "prosecutor's deliberate elicitation of evidence that [Defendant] remained silent and did not tell the State's investigators about Saxton's involvement in the shooting . . . was a clear violation of [Defendant]'s state and federal constitutional rights[.]"

¶ 34 Defense counsel first articulated Defendant's theory of the case—that Mr. Saxton shot Mr. Beecher—during his opening statement. The prosecutor later questioned Det. Godwin on direct examination regard-

ing whether Defendant mentioned his account of the events of 1 April 2017 during Defendant's post-arrest interview:

> Q Okay. And did you have an opportunity to talk to [Defendant] after he was charged with first degree murder?
>
> A I did.
>
> Q After . . . Defendant was charged with first degree murder, did he tell you the story that [defense counsel] said in his opening?
>
> A No. That's the first time I've heard that was during the opening. He never said anything about that.
>
> Q So [Defendant] didn't tell you, even after he was charged, that William Saxton took the car and the gun over to Lincoln Street.
>
> A No, he did not.
>
> Q Did [Defendant], when he was charged, after he was charged, in that interview, did he tell you anything about anybody else going back over to Lincoln Street and shooting Harry Beecher?
>
> A No.
>
> Q Was he able to explain to you why he smelled like gasoline?
>
> A I believe he may have mentioned [he] may have spilled some gas. He was -- was not real -- he didn't want to talk about that when I mentioned that to him, even during the interview, the second interview.
>
> Q Even after the last interview in December of 2017, after the Defendant was charged, did he ever say anything about seeing or being in William Saxton's presence at any time after dark on April 1st, 2017 until the sun came up on April 2nd, Sunday, 2017?
>
> A No.

¶ 35 Defendant contends that this line of questioning violated his constitutional right not to incriminate himself because it impermissibly referenced his post-arrest silence for the purposes of impeaching his credibility. We disagree.

¶ 36 "A criminal defendant's right to remain silent is guaranteed under the Fifth Amendment to the United States Constitution and is made applicable to the states by the Fourteenth Amendment." *Moore*, 366 N.C. at 104, 726 S.E.2d at 172. "We have consistently held that the State may not introduce evidence that a defendant exercised his Fifth Amendment right to remain silent." *Id.* (citation omitted). As our Supreme Court has explained, "[t]he rationale underlying this rule is that the value of constitutional privileges is largely destroyed if persons can be penalized for relying on them." *Id.* (citation and internal quotation marks omitted).

¶ 37 However, where a criminal defendant does not in fact remain silent but makes "spontaneous utterances" to law enforcement officers, "in-court questioning of the officers on the extent of [a] defendant's statements" does not violate the right against compelled self-incrimination. *State v. Alkano*, 119 N.C. App. 256, 260, 458 S.E.2d 258, 261, *appeal dismissed*, 341 N.C. 653, 465 S.E.2d 533 (1995). Indeed, "[s]ilence at the time of arrest is the critical element of the Fifth Amendment right . . . . The [United States] Supreme Court has described that right as the right to remain silent unless [the defendant] chooses to speak in the unfettered exercise of his own will." *Id.* at 261, 458 S.E.2d at 262 (emphasis, citation, and internal quotation marks omitted). And where a criminal defendant does not exercise the right to remain silent but instead speaks to law enforcement officers "regarding the facts of the incident at the time of his arrest[,]" the rule prohibiting a reference to a defendant's exercise of the right to remain silent "can have no application[.]" *Id.* (citation omitted).

¶ 38 For example, in *State v. Richardson*, the prosecutor improperly cross-examined the defendant regarding the exercise of his right to remain silent by declining to give a statement to police:

> Q. Now, you sat here through the entire trial and you heard all of the State's witnesses testify, right?
>
> A. Yes.
>
> Q. And you heard your own witness testify, didn't you?
>
> A. Yes.
>
> Q. Today, today is the very first time that you have given a statement in this case, isn't it?
>
> A. Yes.

226 N.C. App. 292, 303–04, 741 S.E.2d 434, 442–43 (2013).

¶ 39 Further, "the prosecutor questioned [the d]efendant extensively about the extent to which [the detective], whom the State did not call as a witness, had attempted to interview him and about [the d]efendant's failure to make a statement to her." *Id.* at 304, 741 S.E.2d at 443. This Court, applying *Moore*, concluded that the trial court erred in allowing this line of questioning, which constituted

> an attempt to impeach [the d]efendant by eliciting testimony that he had had an opportunity to make a post-arrest statement to [the detective] in the event that he was willing to waive his *Miranda* rights and that [the d]efendant failed to "tell his side of the story." As a result, this questioning, which comprised a significant part of the [p]rosecutor's cross-examination of [the d]efendant and which elicited evidence that [the d]efendant had failed to make a statement after refusing to waive his *Miranda* rights, was clearly impermissible[.]

Id. at 307, 741 S.E.2d at 444.

¶ 40 In *Alkano*, however, the defendant "was not silent regarding the facts of the incident at the time of his arrest." 119 N.C. App. at 261, 458 S.E.2d at 262. Because the defendant did not actually exercise his right to remain silent, we concluded that "[t]he prosecutor's questions to the officers concerning [the] defendant's lack of explanation did not violate [the] defendant's rights against self-incrimination under either the United States or North Carolina Constitutions." *Id.* at 262, 458 S.E.2d at 262.

¶ 41 The case at hand bears more similarity to *Alkano* than to *Richardson*. Here, Defendant did not actually remain silent; he spoke with Det. Godwin when he was arrested, telling Det. Godwin that he did not shoot Mr. Beecher and that he did not know who did. Defendant himself testified to making this statement to Det. Godwin. The prosecutor's questions to Det. Godwin regarding the differences between Defendant's voluntary statement—that he did not kill Mr. Beecher and he did not know who did—and his explanation at trial—that he suspected that Mr. Saxton killed Mr. Beecher—do not amount to an impermissible comment on Defendant's post-arrest silence because Defendant was not silent. Thus, "[t]he prosecutor's questions to [Det. Godwin] concerning [D]efendant's lack of explanation did not violate [D]efendant's rights against self-incrimination under either the United States or North Carolina Constitutions." *Id.*

III. Conclusion

¶ 42 Accordingly, we conclude that although the trial court erred by overruling Defendant's objections to certain impermissible lay-witness opinion testimony, the error did not amount to prejudicial error. We further conclude that the trial court did not err by permitting the prosecutor to question a law enforcement officer regarding the difference between Defendant's statement upon his arrest and his theory of defense at trial. Thus, Defendant received a trial free from prejudicial error.

NO PREJUDICIAL ERROR.

Judges DILLON and HAMPSON concur.

STATE OF NORTH CAROLINA
v.
BRANDON LAMAR SURRATT, DEFENDANT

No. COA20-455

Filed 3 August 2021

1. Constitutional Law—effective assistance of counsel—direct appeal—dismissal without prejudice

Defendant's ineffective assistance of counsel claims on direct appeal from drug-related convictions were dismissed without prejudice where the cold record was insufficient for the appellate court to determine whether counsel's performance was deficient.

2. Continuances—time to prepare for trial—uncomplicated criminal case—prejudice analysis

Even assuming that the trial court erred by denying defendant's motion to continue where defendant met with his attorney only briefly the day before his trial for drug-related charges, defendant failed to show prejudice from the assumed error. Defendant's attorney had adequate time to prepare, and the case was not complicated.

Appeal by Defendant from judgment entered 31 July 2019 by Judge Daniel A. Kuehnert in Cleveland County Superior Court. Heard in the Court of Appeals 23 February 2021.

Attorney General Joshua H. Stein, by Special Deputy Attorney General James Bernier, Jr., for the State.

Leslie Rawls for defendant-appellant.

MURPHY, Judge.

¶ 1 When the Record is incomplete or unclear regarding a defendant's relationship with his or her attorney, we cannot determine whether a defendant is deprived of effective assistance of counsel. Here, we dismiss Defendant's ineffective assistance of counsel claim without prejudice as the claim cannot be decided on our existing appellate Record.

¶ 2 In addition, the trial court does not commit constitutional error when the Record clearly shows a defendant's attorney had adequate time to prepare for trial. Here, the trial court did not commit constitutional error as a thorough examination of the Record reveals Defendant's attorney had adequate time to prepare for trial.

BACKGROUND

¶ 3 On 12 October 2017, the City of Shelby Police Department conducted a controlled purchase between a paid informant and Defendant Brandon Lamar Surratt ("Defendant"), which was captured on a video and audio recording. The paid informant purchased $30.00 worth of cocaine from Defendant. Defendant was indicted on the following charges: one charge of possession with intent to manufacture, sell, and deliver a controlled substance, namely cocaine, a Class H felony; one charge of sale and delivery of a controlled substance, namely cocaine, a Class G felony; and attaining habitual felon status. N.C.G.S. § 90-95(b)(1) (2019); N.C.G.S. § 90-95(b)(1)(i) (2019). Defendant's habitual felon status could elevate these charges to Class D and Class C felonies, respectively. N.C.G.S. § 14-7.6 (2019).

¶ 4 Mr. Joshua Valentine ("Valentine") was appointed as Defendant's counsel in June 2019. However, under a local "rule or [] practice," Valentine was not qualified to be appointed on cases above Class F felonies. Valentine filed a *Motion to Withdraw as Counsel* on 8 July 2019. As grounds for the motion, Valentine stated:

> 1. Local jurisdiction rules do not allow [him] to represent [] Defendant in a habitual felon charge to which he has been appointed.
>
> 2. *Irreconcilable differences have arisen in this attorney-client relationship.*

(Emphasis added). On 29 July 2019, the trial court determined, based on Valentine's experience as a retained attorney dealing with matters

involving felonies above Class F, there was not an issue with Valentine representing Defendant at trial.

¶ 5 Defendant's trial began on 30 July 2019. During a discussion of pretrial matters, Valentine indicated, "I think my client has an oral motion he would like to make to the [c]ourt. He's asked if he'd be allowed to speak." The trial court allowed Defendant to be heard, and he made an oral motion to continue, arguing he did not have enough time to prepare for trial with his appointed counsel:

> [DEFENDANT]: Yes. A few months back, and I just appointed him last month.
>
> *This month I got a court date, but I was unaware of they had appointed me him. And then just yesterday went over my case briefly. So I wouldn't had any time -- ample time to go over my case at all with him. We went over it briefly yesterday.* So I'm asking to continue for one more time to go over my case. My life we dealing with. I ask give me more time to go over my case. We briefly went over it yesterday.

(Emphasis added). After inquiring with Valentine, the trial court denied Defendant's motion:

> THE COURT: [] Valentine, do you have any reservation about going forward with the case? Your client's acting like, you know, you haven't had -- he hasn't had enough time with you. I'm wondering if the time you've been appointed to going forward with this trial.
>
> [VALENTINE]: Yes, Your Honor.
>
> So I was appointed back in June to his case. So I was not involved throughout the whole, you know, administrative process.
>
> THE COURT: That's normal.
>
> [VALENTINE]: Yeah.
>
> So I have spent a good amount of time over the weekend and yesterday preparing if the case did go to trial. I will tell the [c]ourt we have not had a lot of time together to review the details and the facts of the case. And, you know, I always like more time, of course. But if the [c]ourt wants to go ahead and proceed, you

know, I am an officer of the [c]ourt and will comply with the [c]ourt's request.

I did make a couple of motions late yesterday that, you know, I'd like to briefly address with the [c]ourt before we do proceed. But like I said --

THE COURT: Let me ask you this. There was a -- I am allowing you to go forward. Yesterday we addressed your -- the habitual felon status, and, you know, I don't know if you looked at that beforehand or not, but I will -- if we get to that point in the proceedings, because it will be a bifurcated trial.

[VALENTINE]: Yes.

THE COURT: I will give you as much time as you need to make sure you do adequate investigation on that part of the trial, if you haven't had the time beforehand, to verify, you know, the prior felonies and those kind of things.

Hang on a minute, sir.

But you had a -- there's a motion in here [8 July 2019] about a motion to withdraw as counsel. Has that motion been addressed?

[VALENTINE]: I think -- I apologize if it wasn't clear yesterday. That was what the DA and I was intending to address regarding the local rules not explicitly allowing me to handle this type of case. I know some other judges have questioned me when I have handled those types of cases. So I had filed that motion in the -- in the hopes that I could get on the record the [c]ourt either allowing or disallowing me to --

THE COURT: Yeah, that's not a problem. I just wanted to make sure there wasn't something else.

. . .

[Defendant], do you have any other -- anything else you want to say?

. . .

[DEFENDANT]: And this is my life we dealing with. I really appreciate a reasonable amount of time to

speak with [Valentine] about my case. This is a serious case, and the habitual felon is serious. And I would really appreciate it if you would help me out with that request.

THE COURT: All right. The -- if at any time -- I mean, you and your lawyer, and your lawyer in particular, has had this case since June, which is plenty enough time to prepare for trial. He's gotten all the discovery; right?

[VALENTINE]: Yes, sir.

THE COURT: Okay. Hang on.

If in the -- I don't want to get into what's going on between you and your client, but if at any point in time you need to have a little extra time after -- before cross-examination or something, you need to talk to your client, just let me know.

[VALENTINE]: Okay.

THE COURT: And you can have that time.

I'm not inclined, [Defendant], to continue the case. I'm not going to do that. You have had this case -- the DA -- it's gone on for a long time. And you -- you have an obligation, as well as your lawyer, but you have an obligation to be prepared yourself. And your lawyer's been around since June, and it doesn't matter -- the case itself has been around longer than that . . . .

. . .

So the [c]ourt's not going to continue the case. I will give you -- at your lawyer's request, I will give you time to discuss any particular matter if you need to have a break, 15-minute break or something at some point during the trial that would be -- I'm going to give some deference to your lawyer and you, give you some time in the middle of the trial, but we are going to go forward with the trial.

This is not a complicated trial.

¶ 6 The jury found Defendant guilty on all charges. Defendant entered a plea of guilty with regard to habitual offender status and the

trial court imposed an active sentence of 74 to 101 months. Defendant timely appealed.

ANALYSIS

¶ 7 On appeal, Defendant argues he was "deprived of effective assistance of counsel when his appointed attorney made him argue *pro se* for a continuance and further failed to advocate on his behalf, *when [Defendant] and the attorney never met until the day before trial and then, only met briefly.*" (Emphasis added). Defendant also argues "[t]he trial court committed constitutional error in denying [Defendant's] motion to continue where he never met his attorney until the day before trial and then, met with him briefly."

A. Ineffective Assistance of Counsel

¶ 8 **[1]** First, Defendant argues he was deprived of effective assistance of counsel because his attorney met with him only once, briefly on the day before his trial.

¶ 9 "On appeal, this Court reviews whether a defendant was denied effective assistance of counsel de novo." *State v. Wilson*, 236 N.C. App. 472, 475, 762 S.E.2d 894, 896 (2014). The United States Supreme Court has established a defendant must satisfy a two-part test in order to show counsel was ineffective:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

Strickland v. Washington, 466 U.S. 668, 687, 80 L. Ed. 2d 674, 693 (1984).

¶ 10 However, "claims of ineffective assistance of counsel should [generally] be considered through motions for appropriate relief and not on direct appeal." *State v. Stroud*, 147 N.C. App. 549, 553, 557 S.E.2d 544, 547 (2001), *cert. denied*, 356 N.C. 623, 575 S.E.2d 758 (2002). "[I]neffective assistance of counsel claims brought on direct review will be decided on the merits *when the cold record reveals that no further investigation is required*, i.e., claims that may be developed and argued without such ancillary procedures as . . . an evidentiary hearing." *State v. Thompson*,

359 N.C. 77, 122-23, 604 S.E.2d 850, 881 (2004) (emphasis added) (marks omitted), *cert. denied*, 546 U.S. 830, 163 L. Ed. 2d 80 (2005). When the reviewing court determines an ineffective assistance of counsel claim cannot be decided on the existing appellate record, it must "dismiss those claims without prejudice, allowing [the] defendant to bring them pursuant to a subsequent motion for appropriate relief in the trial court." *Id.* at 123, 604 S.E.2d at 881.

¶ 11 In support of his ineffective assistance of counsel claim, Defendant argues he "never met [Valentine] until Monday, 29 July 2019, the day before trial." He claims "[t]he [R]ecord does not show when [Defendant] and his attorney met or for how long[,]" but also states the Record "does show that after arguing his motion to withdraw that morning, [Valentine] filed five motions that afternoon at and just after 3:15." Defendant repeatedly argues he was deprived of his right to adequate time to consult with his attorney and prepare for trial because he "[met] with [Valentine] only once, the day before trial" and Valentine did not "support [Defendant's] request to meet more than once to go over the case and prepare for trial."

¶ 12 We cannot properly decide whether Defendant was deprived of effective assistance of counsel on direct appeal because the cold Record reveals further investigation is required. *See id.* at 123, 604 S.E.2d at 881. For example, during his motion to continue, Defendant stated:

> [DEFENDANT]: This month I got a court date, *but I was unaware of they had appointed me him*. And then just yesterday went over my case briefly. So I wouldn't had any time -- ample time to go over my case at all with him. We went over it briefly yesterday. So I'm asking to continue for one more time to go over my case. . . . I ask give me more time to go over my case. We briefly went over it yesterday.

(Emphasis added). If true, such a claim could possibly merit relief. However, the Record reflects on 8 July 2019, Valentine filed a *Motion to Withdraw as Counsel*, citing "[i]rreconcilable differences have arisen in this attorney-client relationship" as one of the reasons for withdrawal. "Irreconcilable differences" indicates that as of 8 July 2019, Defendant and Valentine had had some sort of communication with one another and Defendant was aware Valentine had been appointed to represent him. It is not readily apparent from the Record when this communication occurred, or for how long, and more information must be developed to determine if Defendant's claim satisfies both parts of the *Strickland* test. *See State v. Adams*, 335 N.C. 401, 410, 439 S.E.2d 760, 764 (1994)

(holding incompleteness in an appellate record precludes a defendant from showing an error occurred), *cert. denied*, 522 U.S. 1096, 139 L. Ed. 2d 878 (1998).

¶ 13 The Record here provides conflicting evidence regarding Defendant's relationship with his attorney. Further, we note neither the parties nor the trial court addressed the "[i]rreconcilable differences" justification for Valentine's 8 July 2019 *Motion to Withdraw as Counsel*. Since we do not have a sufficient Record to determine whether counsel's performance was deficient, the appropriate remedy is to remand the case to the trial court to address those claims. We dismiss Defendant's ineffective assistance of counsel claim without prejudice, "allowing [D]efendant to bring [it] pursuant to a subsequent motion for appropriate relief in the trial court." *Thompson*, 359 N.C. at 123, 604 S.E.2d at 881.

B. Motion to Continue

¶ 14 **[2]** Defendant also argues he is entitled to have his conviction vacated and to a new trial because "[t]he trial court committed constitutional error in denying [his] motion to continue where he never met his attorney until the day before trial and then, met with him briefly."

¶ 15 Ordinarily, "[a] motion for continuance . . . is . . . addressed to the sound discretion of the trial judge whose ruling thereon is not subject to review absent an abuse of such discretion." *State v. Branch*, 306 N.C. 101, 104, 291 S.E.2d 653, 656 (1982). However, "when a motion raises a constitutional issue, the trial court's action upon it involves a question of law which is fully reviewable by an examination of the particular circumstances presented by the record on appeal of each case." *Id.*

¶ 16 "It is implicit in the constitutional guarantees of assistance of counsel and confrontation of one's accusers and witnesses against him that an accused and his counsel shall have a reasonable time to investigate, prepare and present his defense." *State v. McFadden*, 292 N.C. 609, 616, 234 S.E.2d 742, 747 (1977). "To establish a constitutional violation, a defendant must show that he did not have ample time to confer with counsel and to investigate, prepare and present his defense." *State v. Tunstall*, 334 N.C. 320, 329, 432 S.E.2d 331, 337 (1993). "Whether a defendant bases his appeal upon an abuse of judicial discretion, or a denial of his constitutional rights, to entitle him to a new trial because his motion to continue was not allowed, he must show both error and prejudice." *State v. Moses*, 272 N.C. 509, 512, 158 S.E.2d 617, 619 (1968).

¶ 17 Assuming, without deciding, that the trial court committed error by denying Defendant's motion to continue, Defendant is unable to show

this assumed error prejudiced him. Defendant urges that prejudice from the denial of the motion to continue "should be presumed" and, quoting *State v. Rogers*, contends that "the likelihood that any lawyer, even a fully competent one, could provide effective assistance is remote." *State v. Rogers*, 352 N.C. 119, 125, 529 S.E.2d 671, 675 (2000) (marks and citations omitted).

¶ 18 In *Rogers*, our Supreme Court stated:

> While a defendant ordinarily bears the burden of showing ineffective assistance of counsel, prejudice is presumed without inquiry into the actual conduct of the trial when the likelihood that any lawyer, even a fully competent one, could provide effective assistance is remote. A trial court's refusal to postpone a criminal trial rises to the level of a Sixth Amendment violation only when surrounding circumstances justify this presumption of ineffectiveness.

Id. (marks and citations omitted). The facts of *Rogers* are easily distinguished from those of the present case. *Rogers* addressed a situation in which the defense attorneys were appointed "to a case involving multiple incidents in multiple locations over a two-day period for which they had only thirty-four days to prepare" for the "bifurcated capital trial" of a complex case involving many witnesses. *Id.* Our Supreme Court expressly based its holding upon "the unique factual circumstances" of the case. *Id.* at 126, 529 S.E.2d at 676. The instant case does not present "the unique factual circumstances" that were present in *Rogers*.

¶ 19 For example, a thorough review of the Record reveals Valentine had adequate time to prepare. The case was assigned to Valentine at some point in June 2019. Defendant's trial began on 30 July 2019. There is nothing in the Record to indicate that at least one month was not enough time for Valentine to prepare for trial. To the contrary, Valentine indicated he "spent a good amount of time over the weekend and [the day before trial] preparing if the case did go to trial." Further, the case here was not complicated. Unlike in *Rogers*, where the case involved "multiple incidents in multiple locations over a two-day period[,]" the case here involved a single incident that occurred on one day: the controlled purchase of cocaine that was captured on video and audio recording. *Rogers*, 352 N.C. at 125, 529 S.E.2d at 675. On the facts of this case, prejudice cannot be presumed; the Record before us appears to demonstrate that Valentine spent adequate time preparing for Defendant's trial. Defendant makes no other argument regarding prejudice. As Defendant

is unable to show prejudice resulting from the assumed error, the trial court did not err in denying the motion to continue.

CONCLUSION

¶ 20 As there are factual discrepancies in the Record, we are unable to determine the effectiveness of counsel upon examination of the cold Record. We dismiss this issue without prejudice to Defendant's right to file a motion for appropriate relief.

¶ 21 Assuming, without deciding, the trial court erred in denying Defendant's motion to continue, the facts of this case do not present the type of highly unusual situation in which prejudice should be presumed. The trial court did not err in denying Defendant's motion to continue.

DISMISSED WITHOUT PREJUDICE IN PART; NO ERROR IN PART.

Chief Judge STROUD and Judge GRIFFIN concur.

STATE OF NORTH CAROLINA
v.
HAROLD EUGENE SWINDELL, Defendant

No. COA20-263

Filed 3 August 2021

Criminal Law—jury instructions—possession of a firearm by a felon—requested instruction—justification defense

In a trial for murder and possession of a firearm by a felon, defendant was entitled to his requested instruction on the affirmative defense of justification on the firearm charge, based on evidence, viewed in the light most favorable to defendant, supporting each of the required factors: defendant was approached by a group of people, one of whom hit him, causing him to fall, at which point defendant believed the other person was going to shoot him; defendant was not the aggressor and told the other person he was not there to fight; once defendant was attacked and fell, by a person who had a reputation for violence, there was no opportunity to retreat; and defendant only took hold of a gun to avoid being shot and dropped the gun when he was able to run away. Where a reasonable jury could have acquitted defendant based on the evidence, the failure to provide the instruction was prejudicial, necessitating a new trial.

Judge JACKSON dissenting.

Appeal by Defendant from judgments entered 27 November 2018 by Judge Jeffery K. Carpenter in Bladen County Superior Court. Heard in the Court of Appeals 10 March 2021.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Marc X. Sneed, for the State.

Leslie Rawls, for Defendant-Appellant.

WOOD, Judge.

¶ 1 Defendant Harold Swindell ("Defendant") appeals from his convictions of second-degree murder and possession of a firearm by a felon. On appeal, Defendant contends the trial court erred when it declined to instruct the jury on justification as an affirmative defense to possession of a firearm by a felon. We agree.

I. Factual and Procedural Background

¶ 2 On May 17, 2017, Defendant received a phone call from his brother, Darryl. Darryl called Defendant because he was worried about a potential physical altercation at Darryl's apartment complex. Defendant and his friend, Broadus Justice ("Justice"), traveled to Darryl's complex, where they witnessed Darryl engaging in a physical altercation with James Ratliff, Anthony Smith ("Anthony"), Bobby Lee Ratliff, and Cequel Stephens ("Cequel"). Defendant and Justice broke up the fight. Defendant, Justice, and Darryl then returned to Defendant's residence.

¶ 3 Darryl's wife called shortly thereafter, requesting Darryl return to their apartment complex. When the three returned to Darryl's apartment complex, Defendant remained outside and conversed with Darryl's neighbors. Defendant then noticed Lonnie Smith ("Lonnie") approach with James Ratliff, Anthony, Bobby Lee Ratliff, and Cequel.

¶ 4 Shawbrena Thurman ("Thurman"), a resident of the apartment complex, testified at trial. According to Thurman, Lonnie asked Defendant, "So you say somebody going to die?" Defendant responded he had no intention of killing anyone or getting into an altercation. In response, Lonnie began to hit Defendant in the face. Thurman testified she did not observe Defendant fall when Lonnie punched him. Thurman testified that, after the fight began, Cequel also engaged in the physical altercation. A crowd formed around them.

¶ 5 Thurman further testified Defendant came to the complex with a firearm and that he never dropped it during the fight with Lonnie. According to Thurman, Defendant yelled, "Back up," and Cequel retreated. Lonnie and Defendant continued to fight for a few moments after Cequel ran. As Lonnie turned to run, Thurman watched as Defendant shot him. Thurman testified she never saw Lonnie with a gun. However, Thurman later testified, "[Lonnie] didn't never have a gun. He didn't never have a gun. He was trying to fight. And he pulled a gun out of his — and I don't even think he knew that he had a gun." She testified that once Lonnie fell, Defendant stood over him and shot again. Shaquay Mullins ("Mullins"), another resident, testified she observed Defendant pull a gun from his pants and shoot Lonnie.

¶ 6 Defendant's recollection of the altercation differed from Thurman and Mullins's. Defendant testified that when Lonnie initially hit him, he took a step back, slipped, and fell onto his buttocks. According to Defendant, Anthony yelled "[b]ack the F up." Defendant observed the crowd begin to retreat. Defendant believed Anthony had a gun because Justice also retreated. In Defendant's opinion, Justice was a large man who would not retreat from a smaller man like Anthony unless he had a firearm. Defendant testified he heard his brother warn that Anthony had a gun.

¶ 7 Defendant further testified he observed a gun a foot or two in front of him and reached up from the ground to obtain the gun before Lonnie could do so. Defendant admitted he intentionally fired the weapon three times because he believed he was about to be killed. Defendant testified he had this belief because he had heard Anthony yell, "Pop him." After Lonnie was shot, Defendant retreated to his vehicle and left. Defendant called 911 and reported the shooting once he had returned to his residence.

¶ 8 Dr. Lauren Scott ("Dr. Scott") performed an autopsy on Lonnie and testified as an expert in forensic pathology at trial. According to Dr. Scott, Lonnie was shot two or three times. The autopsy report reveals one bullet had an upward trajectory, entering Lonnie's back, and traveling through organs into his chest. Another bullet entered Lonnie's right thigh, "centered 28.5 [inches] to the right heel[,]" and exiting "centered 27.5 [inches] to the right heel." A third wound track revealed a gunshot wound in Lonnie's left thigh. The autopsy report speculates whether the third wound track "represent[s] a re-entrance wound . . . or a separate gunshot wound."

¶ 9 At trial, Defendant requested a jury instruction on the affirmative defense of justification. The trial court denied this request. Defendant's

counsel objected and renewed his objection after the jury received its instructions. On appeal, Defendant asserts the trial court erred in failing to instruct the jury on the justification defense.

II. Discussion

¶ 10 Defendant's sole argument on appeal is that the trial court erred in declining to instruct the jury on the affirmative defense of justification to possession of a firearm by a felon. "In North Carolina, requests for special jury instructions are allowable pursuant to [N.C. Gen. Stat.] §§ 1-181 and 1A-1, Rule 51(b)." *State v. Napier*, 149 N.C. App. 462, 463, 560 S.E.2d 867, 868 (2002). A trial court must give all requested jury instructions if the requested instructions "are proper and supported by the evidence." *State v. Craig*, 167 N.C. App. 793, 795, 606 S.E.2d 387, 388 (2005) (citation omitted). To determine "whether a defendant is entitled to a requested instruction, [appellate courts] review de novo whether each element of the defense is supported by the evidence, when taken in the light most favorable to [the] defendant." *State v. Mercer*, 373 N.C. 459, 462, 838 S.E.2d 359, 362 (2020) (citation omitted); *see also State v. Montague*, 298 N.C. 752, 755, 259 S.E.2d 899, 902 (1979) (holding that if there is sufficient evidence in the light most favorable to defendant to support an instruction for an affirmative defense, "the instruction must be given even though the State's evidence is contradictory."(citation omitted)). A trial court's erroneous failure to give a requested instruction "is prejudicial and requires a new trial only if there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial." *State v. Castaneda*, 196 N.C. App. 109, 116, 674 S.E.2d 707, 712 (2009) (citation and quotation marks omitted).

¶ 11 Under N.C. Gen. Stat. § 14-415.1(a), it is "unlawful for any person who has been convicted of a felony to purchase, own, possess, or have in his custody, care, or control any firearm." N.C. Gen. Stat. § 14-415.1(a) (2020). A person found in violation of Section 14-415.1(a) is guilty of a Class G felony. N.C. Gen. Stat. § 14-415.1(a).

¶ 12 Our Supreme Court has recently adopted justification as an affirmative defense to possession of a firearm by a felon. *State v. Mercer*, 373 N.C. 459, 838 S.E.2d 359 (2020).[1] For a defendant to be entitled to a jury instruction on justification, he must meet a four-part test:

---

1. The justification defense originates in our federal courts. *See U.S. v. Deleveaux*, 205 F.3d 1292 (11th Cir. 2000). Our Supreme Court's adoption of the justification defense for possession of a firearm by a felon comes after this Court applied the defense in several instances, assuming, but not deciding, that the justification defense applied in North Carolina.

> (1) that the defendant was under unlawful and present, imminent, and impending threat of death or serious bodily injury; (2) that the defendant did not negligently or recklessly place himself in a situation where he would be forced to engage in criminal conduct; (3) that the defendant had no reasonable legal alternative to violating the law; and (4) that there was a direct causal relationship between the criminal action and the avoidance of the threatened harm.

Id. at 464, 838 S.E.2d at 363 (quoting *U.S. v. Deleveaux*, 205 F.3d 1292, 1297 (11th Cir. 2000)); *Craig*, 167 N.C. App. at 796, 606 S.E.2d at 389. The defense of justification has been reserved for "narrow and extraordinary circumstances." *Mercer*, 373 N.C. at 463, 838 S.E.2d at 362. The justification instruction must be given when evidence for each factor is presented. *Id.* at 464, 838 S.E.2d at 363.

¶ 13 Our case law has placed an emphasis on the timing of a defendant's possession of the firearm. To be entitled to the justification defense, a defendant must only possess the firearm while "under unlawful and present, imminent, and impending threat." *Id.* at 464, 838 S.E.2d at 363 (citation omitted). In *State v. Napier*, 149 N.C. App. 462, 560 S.E.2d 867 (2002), this Court held the justification defense is inapplicable to a defendant who voluntarily armed himself several hours prior to a threat. *Id.* at 464, 560 S.E.2d at 868-69. In *Napier*, the defendant was a convicted felon who had an ongoing dispute with a neighbor. *Id.* at 462, 560 S.E.2d at 868. The defendant walked to his neighbor's property and stayed there for several hours before shooting the neighbor's son. *Id.* at 463-65, 560 S.E.2d at 868-69. As the defendant was armed during a period where there was no "unlawful and present, imminent, and impending threat," this Court held he was not entitled to a justification instruction. *Id.* at 465, 560 S.E.2d at 869; *see also State v. Boston*, 165 N.C. App. 214, 222, 598 S.E.2d 163, 167-68 (2004); *State v. Monroe*, 233 N.C. App. 563, 570, 756 S.E.2d 376, 381 (2014); *State v. Edwards*, 239 N.C. App. 391, 396, 768 S.E.2d 619 (2015); *State v. McNeil*, 196 N.C. App. 394, 398, 674 S.E.2d 813, 821 (2009); *State v. Ponder*, No. COA11-1365, 220 N.C. App. 525, 725 S.E.2d 674, 2012 WL 1689526 (N.C. Ct. App. May 15, 2012) (unpublished) (all holding the defendant was not entitled to the justification defense because there was no imminent threat at the time the defendant acquired the firearm).

¶ 14 In *State v. Craig*, 167 N.C. App. 793, 606 S.E.2d 387 (2005), this Court declined to expand the justification doctrine to include instances where the defendant possessed the firearm after the threat had passed,

"because there was a time period where [the d]efendant was under no imminent threat while possessing the gun." *Id.* at 797, 606 S.E.2d at 389; *see also State v. McFadden*, No. COA15-957, 247 N.C. App. 400, 786 S.E.2d 433, 2016 WL 1745118 (2016) (N.C. Ct. App. May 3, 2016) (unpublished); *State v. Litaker*, No. COA19-189, 269 N.C. App. 385, 836 S.E.2d 782, 2020 WL 64798 (N.C. Ct. App. Jan. 7, 2020) (unpublished).

¶ 15 In addition to possessing the firearm in the presence of an imminent threat, a defendant must not have a reasonable alternative to violating the law. In *Edwards*, the defendant was found "standing with other[s] in a vacant lot . . . . When [the] defendant saw the officers, he 'hurriedly started walking away' and 'reached into his waistband and pulled out a [handgun] . . . ." 239 N.C. App. at 391, 768 S.E.2d at 620. Although the defendant contended he was being threatened and needed the gun for protection, he failed to present evidence of "the circumstances under which defendant was 'in a situation where he would be forced to engage in criminal conduct'; [and] whether defendant had a reasonable alternative to violating the law . . . ." *Id.* at 395, 768 S.E.2d at 622. Because the defendant obtained the firearm nearly an hour before law enforcement discovered he was in possession of the weapon, this Court held he was not entitled to the justification defense. *Id.* at 394-95, 768 S.E.2d at 621-22.

¶ 16 Likewise, several of our unpublished justification decisions have recognized that, where the defendant obtains a firearm in anticipation of an imminent threat, he has a reasonable alternative to violating the law. *See*, *e.g.*, *Ponder*, No. COA11-1365, 220 N.C. App. 525, 725 S.E.2d 674, 2012 WL 1689526, at *2 (defendant not entitled to justification where he voluntarily obtained a firearm and waited to confront the victim, instead of "telephon[ing] the police"); *State v. Lyles*, No. COA02-1139, 157 N.C. App. 142, 578 S.E.2d 327, 2003 WL 1701564, at *3 (N.C. Ct. App. April 1, 2003) (unpublished) (defendant had a reasonable alternative to violating the law where he "had only to refuse to take the gun that was already in [another's] safekeeping.").

¶ 17 However, the justification defense shall apply where a defendant can present evidence of all four elements. *See State v. Mercer*, 260 N.C. App. 649, 818 S.E.2d 375 (2018), *aff'd*, 373 N.C. 459, 838 S.E.2d 359 (2020). In *Mercer*, the defendant's cousin had been involved in several physical altercations in the defendant's neighborhood. *Id.* at 650-51, 818 S.E.2d at 376-77. The defendant's cousin was engaged in an altercation in the defendant's yard while the defendant was not home. Upon arriving, the defendant became involved in the altercation. *Id.* at 651, 818 S.E.2d at 377. The defendant heard guns cocking, and saw that his

cousin, as well as the persons whom he had observed engaging in the altercation with his cousin, was armed. *Id.* at 653, 818 S.E.2d at 378. Defendant took possession of the firearm when he observed his cousin struggling with it. *Id.* At trial, the State presented evidence suggesting the defendant brought a firearm to the fight. *Id.* at 651, 818 S.E.2d at 376-77. The defendant was later convicted of possession of a firearm by a felon. *Id.* at 650, 818 S.E.2d at 376. On appeal, the State argued the defendant was not entitled to the justification defense, as his actions were not reasonable. However, this Court held reasonableness was a "question for the jury, after appropriate instruction." *Id.* at 658, 818 S.E.2d at 381 (citation omitted). This Court further held that the defendant was entitled to an instruction on justification, because the defendant presented evidence "that he only grabbed the gun . . . when he heard guns being cocked, and threw it back to [his cousin] when he was able to run away" and that he was not the aggressor. *Id.* at 657, 818 S.E.2d at 380.

¶ 18 In the present appeal, the evidence tends to show Defendant fell onto his buttocks after Lonnie hit him. Defendant testified he was in "complete fear" and thought he was "about to be killed and using the gun was the only thing that could save his life." Prior to the shooting, Defendant heard his brother call out, "Watch out. He got [sic] a gun." Defendant heard Lonnie's brother say, "Pop him. Pop him," which he understood to mean "shoot him." Defendant testified he only grabbed the gun because he fell and believed Lonnie would shoot him. Defendant's testimony that he fell to his buttocks is corroborated by the autopsy report, which provides that the likely-fatal bullet wound followed an upward trajectory. Immediately after the shooting, Defendant "threw the gun" on the ground and ran to his vehicle. Taking the evidence in the light most favorable to Defendant, we hold Defendant only possessed the firearm during the time he was under "an unlawful and present, imminent, and impending threat." *See Mercer*, 373 N.C. at 464, 838 S.E.2d at 363-64.

¶ 19 Addressing the second element, the evidence demonstrated that Defendant broke up a fight earlier in the day. After the fight, Defendant returned to his residence for approximately fifteen minutes. Defendant, Darryl, and Justice returned to Darryl's complex at the request of Darryl's wife. After returning to the complex, Defendant remained outside and conversed with several residents, many of whom asked about the earlier fight. Approximately half an hour after Defendant returned to the complex, the second altercation occurred. Defendant was not the aggressor and attempted to explain to Lonnie that he was not there to fight with anyone. Taking "the evidence in the light most favorable to [D]efendant, we conclude that a jury could find [] he did not negligently or recklessly

place himself in a situation where he would be forced to arm himself." *See id.* at 465, 838 S.E.2d at 364.

¶ 20 The State argues that, even if the first two elements are met, Defendant is not entitled to the justification instruction because he had a reasonable alternative to violating the law. The State contends Defendant could have retreated to his vehicle after the altercation began and left the scene without obtaining the firearm. Defendant testified that he "imagine[d]" he could have gotten into his vehicle and left prior to the shooting. However, evidence also tended to show Defendant was physically attacked by Lonnie—who had a reputation for violence—and that Defendant fell after Lonnie initiated the second fight. Defendant saw a gun in front of him and heard Lonnie's associates call for Lonnie to shoot him. Taking the evidence in the light most favorable to Defendant, "a reasonable jury could conclude that it was too late to call 911 and that running away would have put him at greater risk of being shot. A jury could have concluded that defendant had no reasonable legal alternative to violating the law." *Id.*

¶ 21 Finally, Defendant meets the fourth element as there was evidence which tended to show a direct causal relationship between the avoidance of imminent harm and Defendant's possession of a firearm. Defendant testified he only took possession of the firearm after he heard bystanders warning that the victim had a gun and because he had fallen onto his buttocks. Defendant feared that if he did not use the firearm, he would be shot. Further, Defendant abandoned the firearm when he was able to run away. Although the State presented evidence to the contrary, taking "the evidence in the light most favorable to [D]efendant, a jury could find that his gun possession was directly caused by his attempt to avoid a threatened harm." *Id.* at 466, 838 S.E.2d at 364.

¶ 22 Taking the evidence in the light most favorable to the defense, Defendant presented evidence in support of all factors necessary for the justification defense. As our Supreme Court emphasized in *Mercer*, we do not determine whether Defendant "was actually justified in his possession of the firearm, as the State did present relevant conflicting evidence on several points. We hold only that he was entitled to have the justification defense presented to the jury." *Id.*

¶ 23 Having determined Defendant was entitled to a jury instruction on justification, we next determine whether Defendant was prejudiced by the trial court's failure to give such an instruction. *See id.* "[A] defendant is prejudiced by errors relating to rights arising other than under the Constitution of the United States when there is a reasonable possibility

that, had the error in question not been committed, a different result would have been reached at the trial out of which the appeal arises." N.C. Gen. Stat. §15A-1443(a) (2020). Here, the jury was not instructed on the justification defense to possession of a firearm by a felon, and it subsequently convicted Defendant on that charge. We hold that, under the facts of this case, a reasonable jury may have acquitted Defendant had it been permitted to consider whether Defendant was justified in his possession of the firearm.

III. Conclusion

¶ 24 Viewing the evidence in the light most favorable to Defendant, we conclude Defendant has made the requisite showing of each element of the justification defense. The trial court committed prejudicial error by denying Defendant's request for a jury instruction on justification as a defense to the charge of possession of a firearm by a felon. Accordingly, we reverse and remand for a new trial.

REVERSED AND REMANDED.

Judge ZACHARY concurs.

Judge JACKSON dissents by separate opinion.

JACKSON, Judge, dissenting.

¶ 25 The issue in this case is whether the trial court erred by denying Defendant's request for a jury instruction on justification as an affirmative defense to his charge of possession of a firearm by a felon. Because I believe the evidence shows that Defendant intentionally placed himself in a dangerous situation, and because he had many reasonable alternatives to violating the law, I would hold that Defendant could not have satisfied the elements of the justification defense. Accordingly, I would hold that the trial court did not err in denying Defendant's requested jury instruction. I respectfully dissent.

I. Factual and Procedural Background

¶ 26 This case arises out of a series of altercations that occurred between Defendant, his brother, and his brother's neighbors in May 2017. In the afternoon of 17 May 2017, Defendant was at home when he received a phone call from his brother Darryl Swindell, asking that Defendant come to Darryl's apartment complex (Oakdale Homes) to pick him up. Darryl asked for a ride because he owed his neighbors money and feared the

neighbors might try to start a fight with him. Defendant left home, accompanied by his friend Broadus Justice, and the two drove to Oakdale Homes to pick up Darryl.

¶ 27 When they arrived at Oakdale, Defendant saw four people (James Ratliff, Anthony Smith, Bobby Lee Ratliff, and Cequel Stephens) beating up his brother. As soon as Defendant got out of the car and began approaching the group, Cequel Stephens approached him and tried to punch him, but Defendant pushed him away. Defendant immediately set to work trying to break up the fight, which was over in approximately two to three minutes. As they began to leave, Anthony Smith shouted at Defendant and his brother "You don't belong out here anyway . . . This is NFL territory." Defendant knew that "NFL" was a local gang which was led by Anthony's brother, Lonnie Smith. Defendant ignored Anthony's statement and returned home with Broadus and his brother.

¶ 28 The group remained at Defendant's home for only ten to 15 minutes before receiving a phone call from Darryl's wife, who lived at Oakdale. Darryl's wife informed him that "the individuals [who fought with Darryl] were back," and Darryl relayed this information to Defendant. Darryl then "asked [Defendant] to take him back to his home" because he "was concerned." So Defendant drove his brother and Broadus back to Oakdale. As Defendant parked and got out of the car, he saw that a group of about ten neighbors were gathered in the Oakdale parking lot having a cookout. Defendant joined the group and remained there for some time, chatting with the neighbors.

¶ 29 After spending approximately 30 minutes socializing with neighbors in the parking lot, Defendant noticed a group of men approach from behind the apartment building. This group included several of the individuals who Defendant had seen fighting earlier that day (Cequel Stephens, Bobby Lee Ratliff, and Anthony Smith) as well as two other individuals who Defendant knew, but who had not been present at the earlier fight (Lonnie Smith and Robert Ratliff). The approaching group was led by Lonnie Smith, who Defendant knew to be "the leader of a local gang called 'NFL,' " and who Defendant characterized as "a pretty tough guy . . . pretty brutal" with a "bad reputation . . . for violence."

¶ 30 After this point, accounts differed on how the altercation between Lonnie and Defendant progressed. According to the voluntary statement which Defendant provided to Officer Rodney Warwick (which occurred later that same evening), Lonnie walked up to Defendant and asked if Defendant had been looking for him, to which Defendant responded "It weren't like that." Lonnie then "began to hit him" in the head and upper

body, and the two "got into a tussle." "[A]s they tussled, other individuals became involved in the altercation; [and] during the altercation, a gun just suddenly appeared . . . everything happened quickly, and the gun just went off." Defendant told Officer Warwick that he had not brought the gun, and that he didn't know who the gun belonged to.

¶ 31 Defendant told Officer Warwick two slightly differing accounts of how the gun ended up going off. Defendant first stated that after the gun appeared, there was a struggle for possession of the weapon, and that "during the tussle for the weapon, that he never had it, but that he definitely touched it," and that he eventually "heard it go off." In another account, Defendant stated that he and Lonnie "struggled over the gun, that [Defendant] got the gun, and the gun went off."

¶ 32 Defendant's trial testimony painted a different picture of the altercation. According to Defendant's trial testimony, as Lonnie and his group approached him in the Oakdale parking lot, Lonnie asked if Defendant had been fighting with Lonnie's brother Anthony. In an attempt to diffuse the situation, Defendant replied "[n]o, I didn't jump on your brother. I was just trying to . . . break up a fight." But Lonnie was not deterred, and began punching Defendant in the head and face. At some point, Lonnie hit Defendant so hard that he stumbled backwards, slipped on some trash on the ground, and fell backwards onto the ground.

¶ 33 Defendant stated that as he was sitting on the ground, trying to recover, Lonnie's brother (Anthony) and Cequel Stephens approached from the side, and Anthony screamed "back the F up" to "the other guys that were with [Defendant]." Defendant's friends obeyed, and backed up away from the fight—which caused Defendant to feel afraid because his friends are large and formidable, whereas Anthony (the one telling them to back up) was "a little guy." Defendant surmised that Anthony must be holding a gun, because otherwise his friends would not have "backed up [that] easy."

¶ 34 Defendant testified that Darryl then called out to him, saying "Watch out. He got a gun." Somewhere in the commotion, Defendant noticed "a gun on the ground" in front of him, but he did not see where it came from. As Anthony and Cequel continued to approach him, Defendant heard one of them say "Pop him," which he understood to mean shoot him. According to Defendant, he then saw Lonnie reach for the gun on the ground, but before Lonnie could reach it Defendant snatched up the gun.

¶ 35 Defendant testified that at that point, he was feeling "complete fear" for his life, because he thought that Lonnie was reaching for the gun to shoot him, and he suspected that Anthony had a gun as well. Defendant

stated that he believed that picking up the gun was "the only thing that could save [his] life at that time." Defendant testified that he then "just picked [the gun] up, basically, and fired" at Lonnie. As soon as he fired the gun, Defendant then dropped it, got into his car, and drove away as quickly as he could.

¶ 36 A witness to the altercation, Shawnbrena Thurman, offered a different account of that night's events during her trial testimony. She stated that as she watched Lonnie approach Defendant, she knew that Lonnie came with the intention of fighting—in fact, she even attempted to stop Lonnie as he approached Defendant, but Lonnie was determined to fight. She testified that after Lonnie reached Defendant, the two began speaking, and she overheard Lonnie say to Defendant "Oh, so you say somebody going to die?" to which Defendant responded "Nah man. It ain't even like that." She then saw Lonnie hit Defendant in the side of the face, and the two men began "throwing their hands up like they was going to fight," and "[s]quaring up to fight." She stated that this "squaring up" went on for some time, and that "[t]he whole time when they was doing the square-up thing, they didn't never say nothing to each other." Lonnie swung at Defendant again, and the two men began throwing punches. She stated that she never saw Defendant fall to the ground.

¶ 37 Soon after, she saw Cequel Stephens "[come] around on the other side of Lonnie like he wanted to fight too, like, trying to act like he was squaring up." Defendant then "backed up and just snatched the gun from [Cequel], right there from the front of his pants." Defendant then told Cequel to "back up," and Cequel ran away. She testified that Lonnie didn't run away, however—Lonnie "was still, like trying to fight [Defendant], even with the gun." Unlike with Cequel, she did not hear Defendant give Lonnie a warning—"[Defendant] didn't never say anything to Lonnie like, 'Back up.' He just went to him like, pow, and just shot him . . . . He just did it."

¶ 38 Shawnbrena testified that after being shot once, Lonnie tried to run away and fell, but Defendant pursued Lonnie, and "shot him again" while he was "on the ground"—"[Lonnie] hit the ground falling, [and Defendant] was already up on top of him and shot him again." While Lonnie lay on the ground bleeding, Shawnbrena asked Defendant why he shot Lonnie, and Defendant responded "I told that MF'er." She testified that she never saw Lonnie holding a gun, and that even after Defendant grabbed the gun from Cequel, there was never "any fight or tussle over the gun," and Defendant "had it in his hand the whole time."

¶ 39 Witness Shaquay Mullins offered similar testimony at trial, stating that as soon as Lonnie threw the first punch at Defendant, the two men

started to "square up one-on-one" to fight. As a crowd began to gather around the fight, she heard Defendant say "If y'all jump me, then I'm going to kill all of y'all." The next thing she saw was that Defendant "pulled the gun out of his pants and just started shooting." She testified that as soon as Defendant started shooting, Lonnie had tried to run away, but that Lonnie "got caught in the back of the legs" by one of Defendant's bullets before he could escape. She stated that Defendant fired at Lonnie "four or five times," and that Lonnie was shot while "he was running away." She never saw Lonnie with a gun.

¶ 40 The State presented forensic evidence from Dr. Lauren Scott at trial, indicating that Lonnie Smith had died from two to three gunshot wounds. One gunshot had entered the right side of his back and exited in the front of his chest; a second had entered from the side of his right leg and exited from the front of his thigh; and a third had entered from the middle of his left thigh and exited from the side of his left leg. Dr. Scott was unable to determine if the gunshot wounds on Lonnie's legs had originated from a single gunshot, or two different gunshots. Dr. Scott stated that the first gunshot wound to the back would have been fatal.

¶ 41 Defendant was indicted on 5 June 2017 in Bladen County Superior Court for first-degree murder and possession of a firearm by a felon.[1] Trial occurred beginning on 13 November 2018 before Judge Jeffery K. Carpenter. Following the presentation of all evidence, Defendant's trial counsel requested that the jury be instructed on self-defense (with regard to the murder charge) and on justification (with regard to the possession of a firearm charge). After hearing argument, the trial court ultimately ruled that Defendant was not entitled to the jury instruction on justification, but chose to still instruct the jury on self-defense.

¶ 42 On 27 November 2018, the jury issued a verdict finding Defendant guilty of second-degree murder and possession of a firearm by a felon. The trial court sentenced Defendant to 300 to 372 months for second-degree murder and a consecutive term of 19 to 32 months for possession of a firearm by a felon. Defendant filed a timely appeal to this Court.

II. Analysis

¶ 43 Defendant raises only one issue on appeal, contending that the trial court erred by denying his requested jury instruction on the justification defense as a potential affirmative defense to the charge of possession of a

1. Defendant was previously convicted of a felony, possession with intent to sell and deliver marijuana, on 16 June 2013.

firearm by a felon. For the reasons explained below, I would hold that the trial court did not err in refusing Defendant's request for this instruction.

A. Preservation

¶ 44 As an initial matter, I first address whether Defendant has properly preserved this issue for appellate review. Specifically, it is necessary to address Defendant's failure to include a copy of his written request for special jury instructions in the appellate record.

¶ 45 Our statutes provide that when a party desires that the trial court provide a specific jury instruction to the jury, the party "may tender written instructions" to the trial court and the other parties "[a]t the close of the evidence or at an earlier time directed by the judge." N.C. Gen. Stat. § 15A-1231(a) (2019). Though the statute uses the permissive verb "may," our courts have typically held that requests for jury instructions must be in writing. *See, e.g.*, *State v. Augustine*, 359 N.C. 709, 729, 616 S.E.2d 515, 530 (2005) ("[T]his Court has held that a trial court did not err where it declined to give requested instructions that had not been submitted in writing.").

¶ 46 However, I believe this rule is still satisfied when it is clear from the *entire record* that the defendant did, in fact, submit a written instruction request to the trial court—even though the written request was somehow omitted from the appellate record. *See, e.g.*, *State v. Locklear*, 363 N.C. 438, 472, 681 S.E.2d 293, 317 (Brady, J., dissenting) (2009) (concluding that the defendant's instruction request was improper when "*nothing in the record* indicat[es] that defendant ever tendered a written request to the trial court") (emphasis added).

¶ 47 Here, although the record does not contain a copy of Defendant's requested written jury instruction on justification, the transcript makes clear that Defendant did, in fact, submit a written request to the trial court. During the charge conference on the final day of trial, the transcript demonstrates that Defendant "handed" the prosecutor and the trial court "a request for jury instructions regarding the possession of a firearm by a felon [charge] that contemplates the *Deleveaux* [justification] test." Moreover, on several occasions during bench conferences the trial court discussed or recited the *Deleveaux* factors (which are the most commonly accepted test for the justification defense), apparently reading from Defendant's written requested jury instruction.

¶ 48 Moreover, after the trial court ultimately denied Defendant's requested instruction, Defendant objected, and the court stated that it would "note your objection for the record. It's certainly . . . an issue

that's explorable on appeal." Defendant also properly objected after the instructions were presented to the jury. *See* N.C. R. App. P. Rule 10(a)(2); *Geoscience Grp., Inc. v. Waters Const. Co.*, 234 N.C. App. 680, 686-87, 759 S.E.2d 696, 700-01 (2014) (noting that our appellate rules require counsel to object to disputed jury instructions both during the charge conference and before the jury retires for deliberation).

¶ 49 Thus, I believe the record demonstrates that Defendant properly submitted his request for the justification instruction in writing, and that Defendant properly objected to the jury instructions in accord with our Appellate Rules. I would hold that this issue has been preserved.

B. Justification Defense

¶ 50 Defendant contends that the trial court should have instructed the jury on the justification defense in connection with his charge of possession of a firearm by a felon. Under North Carolina law, it is illegal for a convicted felon to possess a firearm, no matter how briefly or temporarily. *See* N.C. Gen. Stat. § 14-415.1(a) (2019) (making it "unlawful for any person who has been convicted of a felony to purchase, own, possess, or have in his custody, care, or control any firearm"). However, our Supreme Court has recently held, in a case of first impression, that a felon may nevertheless possess a firearm under "narrow and extraordinary circumstances" when presented with an "imminent and impending threat of death or serious bodily injury," such that he has no choice but to arm himself in his defense. *State v. Mercer*, 373 N.C. 459, 462-64, 838 S.E.2d 359, 362-63 (2020). This doctrine is known as the justification defense, and functions as "an affirmative defense," similar to self-defense, which requires that the defendant prove all elements of the defense "to the satisfaction of the jury" in order to be excused of liability for possessing a firearm. *Id.* at 463, 838 S.E.2d at 363.

¶ 51 In general, a trial court must give the substance of a requested jury instruction if it is "correct in itself and supported by [the] evidence." *Locklear*, 363 N.C. at 464, 681 S.E.2d at 312 (internal marks and citation omitted). In order to determine "whether a defendant is entitled to a requested instruction, we review de novo whether each element of the defense is supported by the evidence, when taken in the light most favorable to defendant." *Mercer*, 373 N.C. at 462, 838 S.E.2d at 362. A trial court's erroneous failure to give a requested instruction "is prejudicial and requires a new trial only if there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial." *State v. Castaneda*, 196 N.C. App. 109, 116, 674 S.E.2d 707, 712 (2009) (internal marks and citation omitted). "The defendant has the burden of demonstrating prejudice." *Id.*

¶ 52 The four elements of the justification defense are as follows:

> (1) that the defendant was under unlawful and present, imminent, and impending threat of death or serious bodily injury;
>
> (2) that the defendant did not negligently or recklessly place himself in a situation where he would be forced to engage in criminal conduct;
>
> (3) that the defendant had no reasonable legal alternative to violating the law; and
>
> (4) that there was a direct causal relationship between the criminal action and the avoidance of the threatened harm.

Mercer, 373 N.C. at 464, 838 S.E.2d at 363 (quoting *United States v. Deleveaux*, 205 F.3d 1292 (11th Cir. 2000)). A trial court is required to instruct the jury on justification when evidence of each of the four elements is present. *Id.*

¶ 53 The most prominent case analyzing these four elements was *Mercer*, wherein the defendant illegally fired a weapon after a large group of people ambushed him outside his home. *Id.* at 460, 838 S.E.2d at 361. A group of 15 people had "walked to defendant's home to fight two of defendant's friends," and when the defendant arrived home he found the group in his driveway "urging defendant and his friends to fight them and blocking defendant from going into his house." *Id.* The defendant tried to speak to them to diffuse the situation, but the group "continued to approach him saying they were 'done talking.' " *Id.* The defendant noticed that several members of the group were armed, and he "heard the sound of guns cocking." *Id.* He noticed that his younger cousin had a gun too, and was struggling to operate it—so the defendant took the gun from his cousin, pointed it at the group and "told them to 'back up.' " *Id.* at 461, 838 S.E.2d at 361. He heard shots begin to fire, and he "dashed to the side of the street" to get away, but when he saw over his shoulder that someone was still shooting at him, he "shot back once and then the gun jammed," whereupon he immediately "threw the gun back" to his cousin and ran away. *Id.* The defendant's testimony was supported by the testimony of his mother, who confirmed that a large group had "ambush[ed]" defendant as he arrived home; that several members of the group were armed; and that someone from the group was "chasing defendant and shooting at him." *Id.* at 460-61, 838 S.E.2d at 361.

¶ 54 During trial, the defendant requested that the jury be instructed on the justification defense (in accord with *United States v. Deleveaux*), but the trial court denied his request. *Id.* The case was appealed to our Supreme Court, which formally adopted the justification test as set out in *Deleveaux*, while emphasizing that the defense was only available under "narrow and extraordinary circumstances." *Id.* at 463, 838 S.E.2d at 362. After reviewing each of the four *Deleveaux* elements, the Court ultimately held that the defendant had presented sufficient evidence to entitle him to the jury instruction. *Id.* at 464, 838 S.E.2d at 363.

¶ 55 The Court found that the first element—whether the defendant was under an imminent serious threat—was satisfied because the defendant was ambushed by a large aggressive group outside his house, and while "backing away from the group, defendant heard the sound of guns cocking and heard someone in the group say they were 'done talking.' " *Id.* at 464-65, 838 S.E.2d at 363-64. The Court found that the second element—whether the defendant recklessly placed himself in a dangerous situation—was satisfied because the defendant found himself in this situation "simply by arriving at his home and trying to explain himself to the group who were blocking him from entering his home." *Id.* at 465, 838 S.E.2d at 364.

¶ 56 The Court found that the third element—whether the defendant had a reasonable alternative to breaking the law—was satisfied because, after the defendant heard guns being cocked, "a reasonable jury could conclude that it was too late to call 911 and that running away would have put him at greater risk of being shot." *Id.* The Court found that the fourth and final element—whether there was a causal relationship between the criminal action and the threatened harm—was satisfied because the defendant only briefly took possession of the gun "when he heard other guns being cocked, and he gave the gun back to his cousin when it jammed and he was able to run away." *Id.* Thus, because the defendant "presented sufficient evidence of each *Deleveaux* factor," the Supreme Court held that "he was entitled to have the justification defense presented to the jury." *Id.* at 466, 838 S.E.2d at 364.

¶ 57 Applying these elements in the present case, I conclude that Defendant has not presented sufficient evidence of each of the four *Deleveaux* factors and thus the trial court did not err in denying him the jury instruction. Specifically, I do not believe that Defendant can satisfy either the second or third element of the test.

¶ 58 The second element of the *Deleveaux* test requires a showing that Defendant "did not negligently or recklessly place himself in a situation where he would be forced to engage in criminal conduct." *Mercer*, 373

N.C. at 464, 838 S.E.2d at 363. Here during the afternoon of 17 May 2017, Defendant had several opportunities to avoid a dangerous confrontation at Oakdale Homes, but each time he chose to go forward despite the danger.

¶ 59 First, Defendant chose to go back to Oakdale Homes for a second time that afternoon, fresh from a fight, despite knowing that more trouble was likely to ensue. Defendant's first visit to Oakdale Homes that afternoon involved breaking up a fight between his brother (Darryl), Lonnie's brother (Anthony), and several others. As Defendant was leaving the fight, Anthony shouted at them "You don't belong out here anyway . . . This is NFL territory"—putting Defendant on notice that he was unwelcome at Oakdale and that Oakdale was considered gang territory.

¶ 60 Defendant then drove his brother to Defendant's home, where they remained for only ten to 15 minutes before receiving a phone call from Darryl's wife, who lived at Oakdale. Darryl's wife informed him that "the individuals [who fought with Darryl] were back," and Darryl relayed this information to Defendant. Darryl then "asked [Defendant] to take him back to his home" because he "was concerned." So, despite knowing that the people he had just fought with were at still at Oakdale, Defendant chose to leave his house again and drive his brother back to Oakdale.

¶ 61 Moreover, according to the written statement that Officer Warwick recorded during his interview with Defendant (which occurred the same night as the shooting), Defendant answered as follows when asked why he returned to Oakdale Homes for a second time that afternoon:

> **[Officer Warwick]:** Being that there was an altercation that . . . [Defendant] went and got his brother from, and then he agreed to take his brother back in just a short time when he knew there was problems, he – he kind of downplayed it, indicated that he – he didn't suspect there would be additional problems, but if there was, that it would only be – rise to the level of a fight.
>
> **[Prosecutor]:** Okay. So [Defendant] told you – he acknowledged there was a likelihood of a fight going back over there?
>
> . . .
>
> **[Officer Warwick]:** Yes

¶ 62 Defendant had a multitude of safer options available to him instead of returning to Oakdale—he could have stayed home and lent his vehicle

to his brother so Darryl could to Oakdale; he could have asked his friend Broadus (who was present with Defendant throughout the whole day) to drop off Darryl; he could have convinced Darryl to stay at Defendant's place until things cooled down; he could have told Darryl's wife to stay inside and call the police if she feared another fight. But Defendant took none of these reasonable precautions—instead, he chose to return to Oakdale, fully knowing that he would see the people he had just fought, and fully knowing there was "a likelihood of a fight" should he return.

¶ 63 Even more rashly, once Defendant arrived at Oakdale, he didn't simply drop his brother off and then depart. Nor did he go inside his brother's apartment to avoid further confrontation. Instead, Defendant chose to congregate with a group of people out in the open in the Oakdale parking lot, chatting and mingling, and even talking with the neighbors about the earlier fight. After spending at least 30 minutes outside chatting, Defendant then saw a group of men approaching him—a group which was led by Lonnie Smith, and also included several of the men who had fought his brother earlier that day (Cequel Stephens, Bobby Lee Ratliff, and Anthony Smith). Defendant knew that Lonnie was dangerous—he himself described Lonnie as "a pretty tough guy . . . pretty brutal" with a "bad reputation . . . for violence," and Defendant further knew that Lonnie was "the leader of a local gang called 'NFL.' " But Defendant nevertheless stood his ground and watched as Lonnie approached.

¶ 64 The moment that Defendant saw Lonnie and the group approaching, he again had a number of safer options available to him—he could have immediately left in his vehicle (which remained in close proximity); he could have gone inside his brother's apartment; he could have called the police if he feared for his safety. In fact, Defendant himself acknowledged that he knew he could have simply gotten in his car and left the moment he saw Lonnie approaching:

> **[Prosecutor]:** So when Mr. Smith approached you . . . you could have – instead of talking to him, you could have just gone – gone to your car and left. You could have done that, couldn't you?
>
> **[Defendant]:** Before he punched me, I just didn't think it would elevate to that level.
>
> **[Prosecutor]:** No. But you could have simply gone to your car, like you did after you shot him, right? You could have gotten in your car and left?
>
> **[Defendant]:** I would imagine so.

[Prosecutor]: But you didn't do that.

[Defendant]: No, I didn't.

¶ 65 Instead of leaving during this opportunity, Defendant carelessly chose to remain in the area and stand his ground while Lonnie and his gang approached, with the obvious intention of fighting.

¶ 66 Thus, I believe the sum of the evidence clearly demonstrates that Defendant recklessly placed himself in a situation where he knew he would likely be forced to engage in criminal conduct. Defendant recklessly returned to Oakdale and lingered in the parking lot despite: (1) getting into a fight with the brother of a local gang leader only 30 minutes prior; (2) being told by a gang member not to come back; (3) being told by Darryl's wife that the people he had fought with were still at Oakdale; and (4) seeing that same gang leader approach him from across the lot.

¶ 67 Defendant argues that he should receive the justification instruction because this case is "significantly similar" to *Mercer*, but the evidence shows otherwise. The defendant in *Mercer* easily satisfied the second element of the *Deleveaux* test because he had no role whatsoever in bringing about the danger that befell him—he simply arrived at his home, fresh from a job interview, only to find himself ambushed by a hostile mob that was intent on fighting him and blocking him from entering his house. *Mercer*, 373 N.C. at 460, 838 S.E.2d at 361. But unlike the defendant in *Mercer*, Defendant here knowingly placed himself into a situation where he knew that violence was likely to arise. Defendant had many opportunities to choose a safer path that day, but instead willingly chose a dangerous route at every turn. Defendant thus cannot satisfy the second element of the *Deleveaux* test.

¶ 68 Nor can Defendant satisfy the third element of the *Deleveaux* test—showing that he "had no reasonable legal alternative to violating the law." *Id.* at 464, 838 S.E.2d at 363. Even when viewing the evidence from Defendant's point of view, there were many rational alternatives that Defendant could have chosen instead of picking up a gun that day.

¶ 69 Defendant's own accounts differ significantly in describing how the second fight outside of Oakdale progressed. According to the statement that Defendant gave to Officer Warwick, after Lonnie began to hit Defendant, the two "got into a tussle," and "as they tussled, other individuals became involved in the altercation; [and] during the altercation, a gun just suddenly appeared." Defendant stated that he and Lonnie "struggled over the gun, that [Defendant] got the gun, and the gun went off."

¶ 70 According to Defendant's trial testimony, after Lonnie approached him and began hitting him, Defendant stumbled and fell backwards, and as he was sitting on the ground he heard Anthony say "back the F up" to "the other guys that were with [Defendant]." Defendant noticed "a gun on the ground" in front of him, but he did not see where it came from. Defendant heard Darryl say "Watch out. He got a gun"—though it is unclear who Darryl was referring to. Defendant heard someone say "Pop him," and before Lonnie could reach for the gun, Defendant snatched it up and immediately shot.

¶ 71 Under either of these accounts, Defendant would have still had several reasonable legal alternatives to picking up the gun and shooting—he could have tried to exit the "tussle" as soon as other individuals became involved; he could have tried to flee to his car or into the apartment building; he could have kicked the gun away out of Lonnie's reach; he could have called for help; or asked his friends to help him fend off Lonnie so he could escape. Defendant chose none of these options, and instead chose to pick up the gun and shoot.

¶ 72 This conclusion is also supported by the forensic evidence presented at trial, which showed that Lonnie had died from a gunshot wound that entered in his back and exited through the front of his chest. This naturally raises the question—if Defendant was truly shooting to defend himself from an imminent threat, and if he truly had no other options, then why did he shoot Lonnie from behind while his back was turned?

¶ 73 Defendant again analogizes to *Mercer* in an attempt to support his argument, but the facts are distinguishable. In *Mercer*, the defendant only took possession of a gun after he heard the attacking group say they were "done talking," saw several of them holding guns, and "heard the sound of guns cocking." *Mercer*, 373 N.C. at 460-61, 838 S.E.2d at 361. He then grabbed the gun from his cousin (who had been struggling to operate it), "shot back once" as he retreated, and then immediately "threw the gun back" to his cousin and ran away. *Id.* Here, even according to Defendant's own account, he never heard any guns cocking, and he never actually saw Lonnie or anyone else holding a gun. The only gun he saw was the one that mysteriously landed on the ground right in front of him. Moreover, once in possession of the gun, Defendant here (unlike the Defendant in *Mercer*) didn't simply fire a warning shot to cover his retreat as he fled—Defendant shot Lonnie Smith at close range, in the back, and fired at least two to three shots. This is not the behavior of a person who has no reasonable alternative to taking up a gun. Thus, I believe that Defendant cannot show that he had no reasonable legal alternative to violating the law, and he cannot satisfy the third element of the *Deleveaux* test.

¶ 74 I recognize that this case presents somewhat sympathetic circumstances—where a seemingly peaceable man, who had earlier gone out of his way to break up a fight, became embroiled in a conflict that he did not start. It is true that Defendant was not the initial aggressor in either of the fights that occurred that day. However, this does not change the fact that Defendant had many chances to do the prudent thing and prevent further violence from occurring—he could have simply not returned to Oakdale for the second time (knowing, as he did, that he was not welcome and that another fight was very likely to ensue); he could have left or gone inside as soon as he saw Lonnie's group approaching from across the parking lot; or he could have sought an opportunity to escape the altercation instead of picking up a gun and shooting. But he did not.

¶ 75 Thus, because Defendant recklessly placed himself in a dangerous situation, and because he had several reasonable alternatives to breaking the law, I believe he cannot satisfy either the second or third element of the *Deleveaux* test. He was accordingly not entitled to have the justification instruction presented to the jury, and the trial court did not err in failing to provide the instruction. I therefore respectfully dissent.

STATE OF NORTH CAROLINA
v.
KIMBERLY GAIL TEESATESKIE, DEFENDANT

No. COA20-190

Filed 3 August 2021

1. Motor Vehicles—driving while impaired—felony death by motor vehicle—impairment—sufficiency of the evidence

In a trial for driving while impaired and felony death by motor vehicle, the State presented substantial evidence from which a jury could find that defendant was appreciably impaired, either mentally or physically, when she drove off a road and struck a tree, including the results of several field sobriety tests, defendant's statements to law enforcement regarding her ingestion of alcohol and hydrocodone that evening, her slurred and strange speech, her unsteady gait while walking, and the opinion of a law enforcement officer that defendant was impaired. Any inconsistencies in the evidence were for the jury to resolve.

2. Evidence—expert testimony—presence of drug in defendant's blood—prejudice analysis

In a trial for driving while impaired and felony death by motor vehicle, a statement by the State's expert that it was possible hydrocodone was present in defendant's blood when defendant drove off a road and struck a tree was not prejudicial even if it had been admitted in violation of Evidence Rule 702. There was not a reasonable possibility that the jury would have reached a different result absent the testimony in light of defendant's statement to an officer that she had ingested hydrocodone approximately an hour and fifteen minutes before the accident.

Appeal by Defendant from judgment entered 12 July 2019 by Judge J. Thomas Davis in Graham County Superior Court. Heard in the Court of Appeals 9 February 2021.

Attorney General Joshua H. Stein, by Assistant Attorney General John W. Congleton, for the State.

Hynson Law, PLLC, by Warren D. Hynson, for defendant-appellant.

MURPHY, Judge.

¶ 1 A trial court properly denies a defendant's motion to dismiss charges of driving while impaired and felony death by motor vehicle when there is sufficient evidence of the defendant's impairment. Sufficient evidence of impairment is such evidence, viewed in the light most favorable to the State, as a reasonable mind might accept as adequate to support the conclusion that the defendant was appreciably impaired, either mentally or physically. Here, the trial court properly denied Defendant's motion to dismiss, where there was sufficient evidence of appreciable physical impairment due to Defendant's failure of multiple sobriety tests, unsteady gait, lethargy, slurred speech, and a drug recognition expert's opinion that Defendant was impaired.

¶ 2 Additionally, a defendant must show an abuse of discretion to be entitled to relief for a trial court's error in allowing expert testimony that does not comply with the requirements of North Carolina Rule of Evidence 702. However, when the substance of improperly admitted expert testimony is admitted properly via another source, a defendant cannot show prejudice. Here, even assuming the trial court abused its discretion in admitting expert testimony indicating that Hydrocodone

could have been in Defendant's blood test and been hidden by other results, this assumed abuse of discretion was not prejudicial since there was evidence that Defendant admitted to an officer that she had taken Hydrocodone.

BACKGROUND

¶ 3 On 1 January 2015, around 10:45 p.m., Defendant Kimberly Teesateskie was driving back from a party with her best friend, Maggie Whachacha, in the passenger seat when Defendant drove off Snowbird Road, a state-maintained highway, and struck a tree. Defendant sustained minor injuries; however, Ms. Whachacha did not survive her injuries. As a result of the accident, Defendant was charged with felony death by motor vehicle, reckless driving, driving while impaired, and murder. Defendant's murder charge was later voluntarily dismissed by the State.

¶ 4 When first responders arrived at the scene of the accident, they had Defendant leave her vehicle and walk to a patrol car so that emergency services could try to help Ms. Whachacha. On the way to the car, Defendant walked normally and without need of assistance. One of the first responders testified Defendant struggled to stay awake and fell asleep while sitting in his patrol car. Additionally, an emergency medical technician ("EMT") testified that, after the accident, Defendant could hear and understand him, had properly functioning and reacting eyes, good pulse and blood pressure, and was able to answer questions competently, such that he did not believe Defendant had ingested any impairing substance.

¶ 5 However, Trooper Harold Hoxit of the North Carolina Highway Patrol, upon speaking with Defendant at the scene, was concerned that she was impaired. Defendant spoke with a "thick fat tongue, sort of mumbling her speech" and seemed to struggle to stay awake. She was responsive and Trooper Hoxit did not notice a smell of alcohol or observe glassy eyes, although he did notice she swayed when walking and he believed it seemed like her balance was off. Defendant claimed to Trooper Hoxit that she was blinded by a truck's headlights, causing her to drive off the left side of the road and her car hit the tree almost immediately after. Trooper Hoxit believed "she possibly could be impaired" and contacted a drug recognition expert. Trooper Hoxit then drove Defendant in his patrol vehicle to the Graham County Sheriff's Office.

¶ 6 A drug recognition expert, Trooper Mike McLeod of the North Carolina Highway Patrol, met Defendant and Trooper Hoxit at the Sheriff's office. Defendant appeared to be asleep in the car when they

arrived, and when she awoke and walked into the Sheriff's office she shuffled and was unsteady on her feet. After a preliminary examination and conducting multiple sobriety tests, Trooper McLeod ultimately concluded Defendant was under the influence of a central nervous system depressant and narcotic analgesic and her mental and physical faculties were appreciably impaired by these substances. Trooper McLeod based this opinion on the totality of the circumstances, including Defendant's results from a horizontal gaze nystagmus ("HGN") test, which revealed six out of six indicators of impairment, a lack of convergence eye test, which indicated impairment, a walk and turn test, which revealed seven out of eight indicators of impairment, a finger to nose test, which indicated possible impairment, her pupil's reaction to light, which revealed a possible indicator of ingestion of drugs due to her pupil's "very slow" reaction to light, her muscle tone check, which indicated possible ingestion of drugs due to the muscle tone being "flaccid [and] excessively soft," and Defendant's statement regarding her drug and alcohol consumption.[1]

¶ 7 Defendant told Trooper McLeod that she had taken Citalopram, Ranitidine HCL, Metformin, Tramadol, Gabapentin, and Hydrocodone earlier that day. She also stated she drank a mixed drink, which had one-and-a-half shots of vodka, and two beers that evening, most recently at 9:30 p.m. Further, she stated she took two 10 mg Hydrocodone pills at 9:30 p.m. A blood sample taken at 2:12 a.m. found a blood alcohol concentration of 0.00 grams of alcohol per 100 millimeters, but revealed the presence of Xanax, Citalopram, and Lamotrigine. Over objection, the State's blood analyst confirmed it was possible "that Hydrocodone could have been present in [Defendant's] blood," but that "[she] could not [report its presence] based on a masking effect of Lamotrigine" or it could have been present in "an abundance that is much smaller than what [she could report] or it may have all been metabolized." The jury was only instructed on alcohol, Alprazolam, also known as Xanax, and Hydrocodone as potential impairing substances. Alcohol and Xanax are central nervous system depressants, and Hydrocodone is a narcotic analgesic.

¶ 8 At the conclusion of the State's evidence, Defendant moved to dismiss the charges, which the trial court denied. Defendant renewed this motion at the conclusion of all evidence, which was again denied.

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1. Trooper McLeod conducted an HGN test, a vertical gaze nystagmus test, a lack of convergence eye test, a modified Rhomberg balance test, a walk and turn test, a finger to nose test, and checked Defendant's vital signs, pupil size and reaction to light, oral and nasal cavities, and muscle tone.

¶ 9 Defendant was convicted of all charges and sentenced to 60 to 84 months in prison.[2] She was convicted of felony death by motor vehicle and driving while impaired under the theory of impairment in N.C.G.S. § 20-138.1(a)(1). N.C.G.S. § 20-138.1(a)(1) (2019) ("A person commits the offense of impaired driving if he drives any vehicle upon any highway, any street, or any public vehicular area within this State: (1) While under the influence of an impairing substance"). Defendant timely appeals.

ANALYSIS

¶ 10 On appeal, Defendant contends the trial court erred in denying her motion to dismiss as there was insufficient evidence of impairment to support her charge of driving while impaired and, in turn, her charge of felony death by motor vehicle. Defendant also argues that she was prejudiced by the trial court's abuse of discretion in admitting speculative expert testimony that Hydrocodone could have been in Defendant's blood. We disagree.

A. Motion to Dismiss

¶ 11 **[1]** Defendant argues her motion to dismiss the charges of felony death by motor vehicle and driving while impaired should have been granted because the evidence of impairment here was insufficient, as it only raised a suspicion or conjecture that Defendant was appreciably impaired.

> We review the trial court's denial of [a] [d]efendant's motion to dismiss de novo. When ruling on a defendant's motion to dismiss, the trial court must determine whether the State presented sufficient evidence (1) of each essential element of the offense charged, and (2) that the defendant is the perpetrator of the offense. To be sufficient, the State must present such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.
>
> As always, in our review of a ruling on a motion to dismiss, we must view the evidence in the light most favorable to the State and allow the State every reasonable inference that may arise upon the evidence, regardless of whether it is circumstantial, direct, or both.

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2. Defendant was properly sentenced only on the reckless driving charge and the felony death by motor vehicle charge, as driving while impaired is a lesser included offense of felony death by motor vehicle.

State v. McDaris, 852 S.E.2d 403, 406-07 (N.C. Ct. App. 2020) (citations and marks omitted). "If there is a conflict in the evidence, the resolution of the conflict is for the jury." *State v. Mason*, 336 N.C. 595, 597, 444 S.E.2d 169, 169 (1994). "A motion to dismiss should be granted, however, when the facts and circumstances warranted by the evidence do no more than raise a suspicion of guilt or conjecture since there would still remain a reasonable doubt as to defendant's guilt." *State v. Simpson*, 235 N.C. App. 398, 403-04, 763 S.E.2d 1, 5 (2014). It is not the role of our Court to sit in place of the jury and impose our interpretation of the evidence. *See State v. Moore*, 366 N.C. 100, 108, 726 S.E.2d 168, 174 (2012) ("The jury's role is to weigh evidence, assess witness credibility, assign probative value to the evidence and testimony, and determine what the evidence proves or fails to prove.").

¶ 12 Here, Defendant's motion to dismiss concerned the charges of felony death by motor vehicle and driving while impaired. "The elements of felony death by [motor] vehicle are: (1) [the] defendant unintentionally causes the death of another; (2) while driving impaired as defined by [N.C.G.S. § 20-138.1(a)(1)] . . . ; and (3) the impairment was the proximate cause of the death." *State v. Davis*, 198 N.C. App. 443, 446-47, 680 S.E.2d 239, 243 (2009) (quoting *State v. Bailey*, 184 N.C. App. 746, 748, 646 S.E.2d 837, 839 (2007)).

¶ 13 In terms of driving while impaired, our statutes read, "[a] person commits the offense of impaired driving if he drives any vehicle upon any highway, any street, or any public vehicular area within this State . . . [w]hile under the influence of an impairing substance[.]" N.C.G.S. § 20-138.1(a)(1) (2019).

¶ 14 Since Defendant only challenges the impairment element, we only analyze whether there was sufficient evidence of impairment. *See* N.C. App. R. 28(a) (2021) ("The scope of review on appeal is limited to issues so presented in the several briefs. Issues not presented and discussed in a party's brief are deemed abandoned.").

> To support a charge of driving while impaired, the State must prove that the defendant has drunk a sufficient quantity of intoxicating beverage or taken a sufficient amount of narcotic drugs, to cause him to lose the normal control of his bodily or mental faculties, or both, to such an extent that there is an appreciable impairment of either or both of these faculties. However, the State need not show that the defendant was "drunk," *i.e.*, that his or her faculties were

> materially impaired. The fact that a motorist has been drinking, when considered in connection with faulty driving *or other conduct indicating an impairment of physical and mental faculties*, is sufficient prima facie to show a violation of [N.C.G.S. § 20-138.1]. It follows that evidence of such faulty driving, along with evidence of consumption of both alcohol and cocaine, is likewise sufficient to show a violation of [N.C.G.S. § 20-138.1].

State v. Norton, 213 N.C. App. 75, 78-79, 712 S.E.2d 387, 390 (2011) (second emphasis added) (citations, footnote, and marks omitted). Giving the State every reasonable inference from the evidence, there was "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion" that Defendant was impaired. *McDaris*, 852 S.E.2d at 407.

¶ 15 Defendant argues the evidence here "did not lend itself to a reasonable inference that [she] was appreciably impaired, but only raised a suspicion or conjecture of that possibility." Defendant bases this argument on evidence showing: the accident occurred at night on a curvy mountain road; Defendant gave consistent explanations of how the accident happened; Defendant expressed concern for the safety of Ms. Whachacha; Defendant was responsive according to EMTs; was able to walk without help; was overweight, diabetic, and had two bad knees in addition to the car accident, which affected the results of her sobriety tests; and that not all of the sobriety tests suggested she was intoxicated. However, Defendant relies only on evidence that conflicts with other evidence presented by the State.

¶ 16 Here, the State presented sufficient evidence of impairment to survive Defendant's motion to dismiss. This evidence includes: Defendant's results from several standardized field sobriety tests, including the HGN test, the walk and turn test, the convergence test, and the finger-to-nose test; Defendant's statement to Trooper McLeod that she drank three and half drinks, with her last being only one hour and fifteen minutes before the accident; Defendant's statement to Trooper McLeod that she took 20 mg of Hydrocodone one hour and fifteen minutes before the accident; Defendant, although not suffering a related injury, was unable to stay awake following the accident; Defendant was observed walking with an unsteady gait; Defendant had slurred and strange speech; and Trooper McLeod's opinion that Defendant was impaired as result of both her performance on the sobriety tests and her behavior. This evidence of impairment of Defendant's physical faculties—namely her slurred

speech, lethargy, unsteady gait, and failed sobriety tests, in connection with an admission to drinking and taking drugs—is sufficient evidence of impairment under N.C.G.S. § 20-138.1. *See Norton*, 213 N.C. App. at 79, 712 S.E.2d at 390 (emphasis added) ("The fact that a motorist has been drinking, when considered in connection with faulty driving *or other conduct indicating an impairment of physical and mental faculties*, is sufficient prima facie to show a violation of [N.C.G.S. § 20-138.1].").

¶ 17 Furthermore, we have held that "[t]he opinion of a law enforcement officer . . . has consistently been held sufficient evidence of impairment, provided that it is not solely based on the odor of alcohol." *State v. Mark*, 154 N.C. App. 341, 346, 571 S.E.2d 867, 871 (2002), *aff'd per curiam*, 357 N.C. 242, 580 S.E.2d 693 (2003). In *Mark*, we held "the State presented sufficient evidence that [the] defendant was impaired" based on a law enforcement officer's "[testimony] that he formed an opinion that [the] defendant was appreciably impaired after conducting a field sobriety test." *Id.* "Accordingly, we [found] no merit to [the] defendant's third assignment of error [to the trial court's denial of his motion to dismiss the driving while impaired charge]." *Id.*

¶ 18 Here, Trooper McLeod, a drug recognition expert, testified that he formed an opinion that Defendant was appreciably impaired by a central nervous system depressant or narcotic analgesic based upon a standardized 12-step drug influence evaluation, which included indications of impairment from Defendant's results on multiple field sobriety tests. This evidence was sufficient evidence of Defendant's impairment. *See id.*

¶ 19 Although Defendant points us to conflicting evidence, conflicting evidence does not allow the trial court to grant a motion to dismiss; it is well established that conflicting evidence is for the jury to resolve. *See Mason*, 336 N.C. at 597, 444 S.E.2d at 169 ("The defendant's only assignment of error is to the overruling of his motion to dismiss for the insufficiency of the evidence. He bases this argument on certain inconsistencies in the evidence and particularly on some evidence that the pistol may have fired accidentally. In determining whether evidence is sufficient to survive a motion to dismiss, the evidence is considered in the light most favorable to the State. If there is a conflict in the evidence, the resolution of the conflict is for the jury."). Defendant's contention that the evidence presented here was only sufficient to create a suspicion of impairment is incorrect, and the conflicting evidence Defendant points to was for the jury to resolve, not us on appeal. The trial court properly denied Defendant's motion to dismiss as there was sufficient evidence of impairment to proceed to a jury, despite conflicting evidence.

B. Expert Testimony

¶ 20 **[2]** Defendant argues the trial court should not have allowed the State's expert, Amber Rowland, to testify:

> It is possible that [Hydrocodone] came out [in the blood test] at the same time as Lamotrigine; and, therefore, I could not call it based on a masking effect of Lamotrigine. It can also be an abundance that is much smaller than what we could call or it may have all been metabolized.

Defendant argues this speculative testimony about the presence of Hydrocodone was in violation of Rule 702 "because it was not based on scientific or technical knowledge that could assist the jury in understanding the evidence or deciding a fact in issue. Moreover, it was impermissibly based on unreliable principles and methods." Further, Defendant argues it was prejudicial to her because "[a]t the heart of this trial was the question of whether [Defendant] was appreciably impaired at the time of the accident" and the expert's testimony regarding Hydrocodone, a drug Defendant claims to be stigmatized,[3] pushed otherwise insufficient and conflicting evidence over the line to convince the jury Defendant was guilty. Specifically, she points to the jury's note asking, "[d]id witness Amber Rowland state in her testimony that Hydrocodone was found in conformatory [sic] or other testing?"

¶ 21 The State contends this issue was not properly preserved because any objection was waived by previous testimony that was not objected to, and Defendant only objected based on relevance and not Rule 702, with any Rule 702 objection not being apparent from the context.

> In order to preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection, or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context. It is also necessary for the complaining party to obtain a ruling upon the party's request, objection, or motion.

N.C. R. App. P. 10(a)(1) (2021). "Where evidence is admitted over objection and the same evidence has been previously admitted or is later admitted without objection, the benefit of the objection is lost." *State v. Alford*,

3. Defendant raises the stigmatization argument for the first time on appeal.

339 N.C. 562, 570, 453 S.E.2d 512, 516 (1995). "Even valid objections may be, and are usually waived in [non-capital cases] by failure to follow the recognized practice by motion to strike or by motion to limit if the evidence is not competent." *State v. Beam*, 45 N.C. App. 82, 84, 262 S.E.2d 350, 352 (1980) (quoting *State v. Battle*, 267 N.C. 513, 520-21, 148 S.E.2d 599, 604 (1966)).

¶ 22 Additionally, Rule 702(a) states:

> (a) If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion, or otherwise, if all of the following apply:
>
> (1) The testimony is based upon sufficient facts or data.
>
> (2) The testimony is the product of reliable principles and methods.
>
> (3) The witness has applied the principles and methods reliably to the facts of the case.

N.C.G.S. § 8C-1, Rule 702(a) (2019). Regarding Rule 702, our Supreme Court has stated:

> The trial court [] concludes . . . whether the proffered expert testimony meets Rule 702(a)'s requirements of qualification, relevance, and reliability. This ruling will not be reversed on appeal absent a showing of abuse of discretion. And a trial court may be reversed for abuse of discretion only upon a showing that its ruling was manifestly unsupported by reason and could not have been the result of a reasoned decision. The standard of review remains the same whether the trial court has admitted or excluded the testimony—even when the exclusion of expert testimony results in summary judgment and thereby becomes outcome determinative.

State v. McGrady, 368 N.C. 880, 893, 787 S.E.2d 1, 11 (2016) (citations and marks omitted).

¶ 23 Assuming, without deciding, that this issue was preserved for appeal and that the admission of Rowland's statement was an abuse of discretion in violation of Rule 702, the statement's admission was not prejudicial given the admission of testimony regarding Defendant's statement to Trooper McLeod that she took 20 mg of Hydrocodone approximately one hour and fifteen minutes before the accident.

¶ 24 Defendant argues this testimony was prejudicial because the evidence that Defendant was impaired was "far from overwhelming," expert testimony is given more weight by the jury, Hydrocodone is a stigmatized drug as a result of the opioid crisis, and the testimony "weighed on the minds of the jurors while they deliberated, as indicated by the jury's note to the trial court during deliberations." However,

> [a] defendant is prejudiced by errors relating to rights arising other than under the Constitution of the United States when there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial out of which the appeal arises.

N.C.G.S. § 15A-1443(a) (2019).

¶ 25 There was not a reasonable possibility that a different result would have been reached if the trial court had excluded the testimony regarding the possible presence of Hydrocodone in Defendant's blood. Although there would not have been expert testimony that Hydrocodone could have been within Defendant's blood, there was testimony from Trooper McLeod that Defendant told him she had ingested 20 mg of Hydrocodone at 9:30 p.m. on the night of the accident.[4] This testimony from Trooper McLeod tended to show Defendant had taken Hydrocodone prior to the accident and may have been impaired by it, in a more convincing way than Rowland's expert testimony did. As a result, any abuse of discretion in admitting Rowland's testimony was not prejudicial.

CONCLUSION

¶ 26 The trial court did not err in denying Defendant's motion to dismiss the charges of driving while impaired and felony death by motor vehicle, as, despite conflicting evidence, there was sufficient evidence of impairment to go to the jury. Further, even assuming, without deciding, that the trial court abused its discretion in admitting expert testimony regarding the potential presence of Hydrocodone in Defendant's blood test results,

4. This testimony has not been challenged on appeal.

Defendant was not prejudiced due to the admission of her statement that she took 20 mg of Hydrocodone approximately one hour and fifteen minutes before the accident.

NO ERROR.

Judges DILLON and ARROWOOD concur.

HANIA H. WILLIAMS AS EXECUTOR AND ADMINISTRATOR OF THE ESTATE OF PATRICK WILLIAMS, PLAINTIFF

v.

MARCHELLE ISYK ALLEN, P.A., NILES ANTHONY RAINS, M.D., BRONWYN LOUIS YOUNG II, M.D., EMERGENCY MEDICINE PHYSICIANS OF MECKLENBURG COUNTY, PLLC D/B/A US ACUTE CARE SOLUTIONS, LLC, C. PETER CHANG, M.D., CHARLOTTE RADIOLOGY, P.A., THE CHARLOTTE-MECKLENBURG HOSPITAL AUTHORITY D/B/A CAROLINAS HEALTHCARE SYSTEM OR ATRIUM HEALTH, DEFENDANTS

No. COA20-724

Filed 3 August 2021

1. Appeal and Error—interlocutory appeal—substantial right—order compelling discovery—medical review privilege

An order compelling discovery in a wrongful death action against a medical group and a physician assistant (defendants) was immediately appealable where defendants argued that the document plaintiff sought in her motion to compel—the physician assistant's notes regarding her interactions with and medical treatment of the decedent—was protected under the medical review privilege, and therefore the order affected a substantial right.

2. Discovery—medical review privilege—statutory elements—insufficient findings

An order compelling discovery in a wrongful death action against a medical group and a physician assistant (defendants) was vacated and remanded where defendants argued that the document plaintiff sought in her motion to compel—the physician assistant's notes regarding her interactions with and medical treatment of the decedent—was protected under the medical review privilege (N.C.G.S. § 90-21.22A), but where the trial court failed to enter any findings of fact or conclusions of law regarding whether defendants met their burden of satisfying each statutory element required to assert the privilege.

Judge MURPHY dissenting.

Appeal by defendants from order entered 24 March 2020 by Judge Forrest Bridges in Mecklenburg County Superior Court. Heard in the Court of Appeals 25 May 2021.

Knott & Boyle, PLLC, by W. Ellis Boyle, for plaintiff-appellee.

Dickie, McCamey & Chilcote, P.C., by John T. Holden, for defendants-appellants Marchelle Allen and Emergency Medicine Physicians of Mecklenburg County, PLLC.

TYSON, Judge.

¶ 1 Marchelle Isyk Allen, P.A. and Emergency Medicine Physicians of Mecklenburg County, PLLC ("EMP") (collectively "Defendants") appeal from an order filed 24 March 2020 compelling production of a document claimed as privileged by Defendants. We remand for additional findings of fact and conclusions of law.

I. Background

¶ 2 Patrick Williams ("Williams") suffered back, stomach, and hip pains, which worsened throughout the morning and afternoon of 6 May 2016. Williams' wife, Hania H. Williams, ("Plaintiff") took Williams to the Piedmont Urgent Care-Baxter in Fort Mill, South Carolina.

¶ 3 Williams could not get out of the car at Piedmont Urgent Care-Baxter. After speaking with Plaintiff, staff at Piedmont Urgent Care-Baxter called 911 for assistance. Williams' condition was not evaluated by a healthcare provider at Piedmont Urgent Care-Baxter. Emergency Medical Services responded to Piedmont Urgent Care-Baxter, moved Williams into an ambulance, and transported him to the emergency department ("ED") at Carolinas Medical Center Pineville Hospital ("CMC-Pineville"). Williams arrived in the ED at 3:52 p.m.

¶ 4 Dr. Brownyn Louis Young, II ordered 7.5 mg of oral hydrocodone and 600 mg of ibuprofen for Williams. The record does not show whether these medicines were issued pursuant to "standing orders" by Dr. Young, or if he had evaluated Williams prior to these orders being administered. Around 4:50 p.m., Physician Assistant Marchelle Allen ("Allen") met with and evaluated Williams. Williams reported he was experiencing increasing lower back pain that radiated down his left leg. Allen ordered 4 mg of morphine, 10 mg of Decadron, 10 mg of Flexeril, 4 mg of Zofran, and an x-ray to be administered to Williams' spine.

¶ 5 Dr. C. Peter Chang read the x-ray and reported "no acute osseous abnormality" and "unusual linear calcifications seen to the right and left of the lumbar spine along the retroperitoneum likely vascular in nature." Dr. Chang noted the x-rays were "negative for acute pathology, . . . negative for acute bony abnormality . . . [and] show vascular calcifications."

¶ 6 Allen did not order further diagnostic tests for Williams. Williams was diagnosed with "left lumbar radiculopathy." Allen ordered prescriptions for Flexeril and hydrocodone. Williams was discharged from CMC-Pineville with instructions to schedule an office visit with OrthoCarolina "within 2-4 days." Dr. Niles Anthony Rains signed Williams' record of the treatment provided by Allen on 7 May 2016 at 6:36 a.m.

¶ 7 Once home, Williams took the prescribed hydrocodone every six hours, but his pain persisted. Williams also developed abdominal pains. Williams returned to the CMC-Pineville ED on 7 May 2016 at 9:56 p.m. Williams presented with low blood pressure and reported severe abdominal pain.

¶ 8 Dr. Rains ordered a CT angiogram of Williams' chest, abdomen, and pelvis with an IV contrast. Dr. Charlie McLaughlin read the images and diagnosed Williams with a ruptured abdominal aortic aneurism measuring 12 x 9.7 centimeters. Dr. Rains contacted the ED at Carolinas Medical Center Main ("CMC-Main") about transferring Williams for immediate surgical repair of the ruptured aneurism. Williams was transferred to CMC-Main by helicopter. Surgery to repair the ruptured aneurism was unsuccessful in saving Williams' life. Williams was pronounced dead at 3:24 a.m. on 8 May 2016.

¶ 9 Dr. Rains spoke with Allen on 9 May 2016 and informed her of Williams' death. Dr. Rains also relayed to Allen Plaintiff's 7 May 2016 statement to emergency department staff if anything should happen to Williams, she would be filing a claim against the personnel who treated him during his 6 May 2016 visit. Dr. Rains instructed Allen to memorialize her interactions with and treatment of Williams on an electronic form provided by her EMP group employer.

¶ 10 Williams' estate brought this action for wrongful death on 2 May 2018, and Plaintiff asserted claim for loss of consortium. Plaintiff requested production of documents relating to investigation by Defendants and any information related to Defendants' interactions with and their care provided to Williams.

¶ 11 Allen submitted a privilege log identifying a four-page "diary" entry she had written on 10 May 2016, concerning the event claiming: "Work Product, and Prepared by the Defendants in anticipation of litigation,

peer review." Plaintiff filed a motion to compel on 17 July 2019 pursuant to N.C. Gen. Stat. § 1A-1, Rule 37(a) (2019). Plaintiff sought the production of a four-page document identified as typed notes Allen had created 10 May 2016, as identified in the privilege log produced on 11 July 2019. After hearing from the parties and examining the document at issue, the trial court granted Plaintiff's motion to compel and the four-page document was delivered to Plaintiff.

¶ 12 Allen was deposed on 30 October 2019. During Allen's deposition, her "diary" entry was presented to her, and the existence of an additional document was discovered. This additional two-page document was not included in Defendants' privilege log, and it was withheld from disclosure due to Defendants' claim of Medical Review Committee and other privileges under N.C. Gen. Stat. § 90-21.22A (2019). Allen created this document utilizing EMP's company website and submitted it to risk management.

¶ 13 Plaintiff filed a motion to enforce her previous motion to compel, pursuant to N.C. Gen. Stat. § 1A-1, Rule 37(b) (2019). In her motion, Plaintiff argued Allen's diary entry that was eventually produced was not in fact what they were seeking in their first motion to compel hearing. Plaintiff alleged she was seeking this second document submitted to risk management and the arguments made by Defendants' counsel at the motion to compel hearing about privilege and peer review were asserted to this second document. Plaintiff argued the asserted privilege could not relate to Allen's diary entry. After hearing from the parties, reviewing the affidavits, and conducting an in-camera review of the disputed second document, the trial court granted the motion, but ordered the subject document to be kept under seal, pending appeal. The trial court denied Plaintiff's sanctions motion and awarded no fees or sanctions. Defendants appealed.

II. Jurisdiction

¶ 14 **[1]** "An order compelling discovery is generally not immediately appealable because it is interlocutory and does not affect a substantial right that would be lost if the ruling were not reviewed before final judgment." *Sharpe v. Worland*, 351 N.C. 159, 163, 522 S.E.2d 577, 579 (1999). Our Court has held: "As a general proposition, only final judgments, as opposed to interlocutory orders, may be appealed to the appellate courts." *Hamilton v. Mortg. Info. Servs., Inc.*, 212 N.C. App. 73, 77, 711 S.E.2d 185, 188 (2011) (citations omitted).

¶ 15 "Appeals from interlocutory orders are only available in exceptional cases." *Id.* (citation and internal quotation marks omitted). Our rules

"against interlocutory appeals seek[] to prevent fragmentary, premature and unnecessary appeals by allowing the trial court to bring a case to final judgment before its presentation to the appellate courts." *Turner v. Norfolk S. Corp.*, 137 N.C. App. 138, 141, 526 S.E.2d 666, 669, (2000) (citation omitted).

¶ 16 "No hard and fast rules exist for determining which appeals affect a substantial right. Rather, such decisions usually require consideration of the facts of the particular case." *Estrada v. Jaques*, 70 N.C. App. 627, 640, 321 S.E.2d 240, 249 (1984) (citations omitted).

¶ 17 An order compelling or enforcing discovery or for sanctions may be immediately appealable if it affects a substantial right under N.C. Gen. Stat. §§ 1-277 or 7A-27(b)(3)a (2019). A substantial right is invoked when a party asserts a statutory privilege, which directly relates to the matter to be disclosed, and the assertion of the privilege is not "frivolous or insubstantial." *K2 Asia Ventures v. Trota*, 215 N.C. App. 443, 447, 717 S.E.2d 1, 4 (2011) (citation omitted). Orders compelling discovery of materials asserting protection by the medical review privilege affects a substantial right and are immediately reviewable on appeal. *Hammond v. Saini*, 229 N.C. App. 359, 362, 748 S.E.2d 585, 588 (2013), *aff'd as modified*, 367 N.C. 607, 766 S.E.2d 590 (2014). This issue is properly before this Court.

III. Issue

¶ 18 Defendants argue the trial court erred by granting Plaintiff's motion to enforce its previous motion to compel production.

IV. Motion to Compel

A. Standard of Review

¶ 19 "Whether or not the party's motion to compel discovery should be granted or denied is within the trial court's sound discretion and will not be reversed absent an abuse of discretion." *Wagoner v. Elkin City Schools' Bd. of Education*, 113 N.C. App. 579, 585, 440 S.E.2d 119, 123, *disc. rev. denied*, 336 N.C. 615, 447 S.E.2d 414 (1994). "To demonstrate an abuse of discretion, the appellant must show that the trial court's ruling was manifestly unsupported by reason, or could not be the product of a reasoned decision." *Nationwide Mut. Fire Ins. Co. v. Bourlon*, 172 N.C. App. 595, 601, 617 S.E.2d 40, 45 (2005) (internal citation omitted), *aff'd per curiam*, 360 N.C. 356, 625 S.E.2d 779 (2006). Questions of statutory interpretation are reviewed *de novo*. *State v. Mackey*, 209 N.C. App. 116, 120, 708 S.E.2d 719, 721 (2011).

B. Analysis

¶ 20 **[2]** The medical review committee privilege is "designed to encourage candor and objectivity in the internal workings of medical review committees." *Shelton v. Morehead Mem'l Hosp.*, 318 N.C. 76, 83, 347 S.E.2d 824, 829 (1986). The party asserting the privilege bears the burden of proof. *Wachovia Bank v. Clean River Corp.*, 178 N.C. App. 528, 531, 631 S.E.2d 879, 882 (2006).

¶ 21 Defendants argue the "fundamental and sole requirement for members of a medical review committee under N.C. Gen. Stat. § 90-21.22A" is that they be licensed. To claim the medical review committee privilege under the statute, a claimant must demonstrate the committee is composed of "healthcare providers licensed under this chapter," the committee be "formed for the purpose of evaluating the quality of, cost of, or necessity for health care services, including provider credentialing," and the documents must be "produced or presented" by the medical review committee. N.C. Gen. Stat. § 90-21.22A (2019).

¶ 22 The trial court did not make the requested findings of fact or conclusions concerning these statutory elements. When asked specifically to do so by counsel, the trial court declined to rule about whether the peer review privilege applied or not. When requested, the trial court's findings of fact and conclusions of law must be sufficiently detailed to allow for meaningful appellate review. *Coble v. Coble*, 300 N.C. 708, 714, 268 S.E.2d 185, 190 (1980).

¶ 23 Defendants' counsel correctly sought clarification of the ruling and requested the trial court to make specific findings and conclusions. "Without setting forth findings of fact, this Court cannot conduct a meaningful review of the conclusions of law and test the correctness of the trial court's judgment." *Earl v. CGR Dev. Corp.*, 242 N.C. App. 20, 24, 773 S.E.2d 551, 554 (2015) (citations, alternations, and internal quotation marks omitted).

¶ 24 The order of the trial court is remanded for factual findings and conclusions of whether Defendants carried their burden to demonstrate the peer or medical review committee they are relying on is composed exclusively of licensed providers under Chapter 90, formed for the purpose of evaluating the quality of the healthcare provided, and whether Allen's document was actually "produced or presented" at the request of her medical superior to the medical review committee in order to properly invoke the privilege under the statute. *See* N.C. Gen. Stat. § 90-21.22A.

V. Conclusion

¶ 25 The trial court failed to make the Defendant's requested and requisite findings of fact and conclusions for meaningful appellate review of the Defendants' burden to invoke the privilege. *Id*. Upon remand, the trial court is free to hear arguments or receive additional material to make and enter factual findings and conclusions consistent with the requirements of N.C. Gen. Stat. § 90-21.22A. *It is so ordered.*

REMANDED.

Judge JACKSON concurs.

Judge MURPHY dissents with separate opinion.

MURPHY, Judge, dissenting.

¶ 26 Without the document at issue contained in the Record before us, we cannot meaningfully review the trial court's order granting enforcement of Plaintiff's preexisting motion to compel. For that reason, I would hold Defendants waived this issue by failing to comply with the requirements established by our rules of appellate procedure, and dismiss the appeal on those grounds.

¶ 27 Even setting aside this error by Defendants, I would nonetheless affirm the trial court's order, and hold Defendants failed to satisfy their burden of production in asserting the medical review committee privilege provided by N.C.G.S. § 90-21.22A. Further, contrary to the Majority's holding, the trial court was not obligated to make specific findings of fact in its order concerning the statutory elements of Defendants' medical review committee privilege claim. Consequently, I find it unnecessary to remand this matter to the trial court. For all of these reasons, I must respectfully dissent.

ANALYSIS

A. Insufficient Record on Appeal

¶ 28 Defendants appeal the trial court's order granting Plaintiff's motion to enforce an existing motion to compel discovery pursuant to N.C.G.S. § 1A-1, Rule 37(b). After learning of the existence of a document in a 30 October 2019 deposition of Defendant Allen, Plaintiff filed a motion seeking its disclosure on 21 November 2019. The trial court entered an order on 24 March 2020 (the "Order") that stated, in relevant part:

> Plaintiff's [m]otion for enforcement of the existing [o]rder pursuant to Rule 37(b) is granted. . . . The [trial] [c]ourt has ordered that this document that [] Defendants handed up under seal during the hearing be maintained under seal by the Clerk's office pending the time for any appeal to be filed, and if appeal is taken, to remain there until the outcome of that appeal is completed before actually producing it to the other parties[.]

¶ 29 As the Majority correctly states, the Order stipulates that the document at issue be maintained under seal, pending appeal. *Supra* at ¶ 13. However, the fact that the document is maintained under seal does not relieve Defendants of their "duty . . . to ensure this Court has everything needed for a proper review of [the] issues on appeal." *Gilmartin v. Gilmartin*, 263 N.C. App. 104, 107, 822 S.E.2d 771, 774 (2018) (citing *State v. Davis*, 191 N.C. App. 535, 539, 664 S.E.2d 21, 24 (2008)), *disc. rev. denied*, 372 N.C. 291, 826 S.E.2d 702 (2019).[1]

¶ 30 Rule 9 of the North Carolina Rules of Appellate Procedure, which governs the record on appeal, states in relevant part:

> (a) . . . . In appeals from the trial division of the General Court of Justice, review is solely upon the record on appeal . . . .
>
> > (1) . . . . The record on appeal in civil actions and special proceedings shall contain:
> >
> > . . .
> >
> > e. so much of the litigation . . . as is necessary for an understanding of all issues presented on appeal . . . ;
> >
> > . . .

1. *See also Doe v. Doe*, 263 N.C. App. 68, 71-72, 72 n.2, 823 S.E.2d 583, 586 & n.2 (2018) (reviewing a sealed court file in its entirety *in camera*); *State v. McCoy*, 228 N.C. App. 488, 492, 745 S.E.2d 367, 370 (2013) ("During the preparation of the record on appeal, [the] defendant's appellate counsel requested and obtained a copy of the sealed [document] from the trial court."), *disc. rev. denied*, *appeal dismissed*, 367 N.C. 530, 762 S.E.2d 462 (2014); *Daly v. Kelly*, 272 N.C. App. 448, 453 n.7, 846 S.E.2d 830, 833 n.7 (2020) ("This Court has reviewed the records under seal[.]"); *Premier, Inc. v. Peterson*, 255 N.C. App. 347, 352, 804 S.E.2d 599, 603 (2017) (noting "we considered all of the documents and testimony under seal").

> j. copies of all other papers filed . . . in the trial court which are necessary to an understanding of all issues presented on appeal unless they appear in the transcript of proceedings . . . ;
>
> . . . .
>
> (c) Presentation of Testimonial Evidence and Other Proceedings. . . . .
>
> . . . .
>
> (4) Presentation of Discovery Materials. . . . . In all instances in which discovery materials are considered by the trial tribunal, other than as evidence offered at trial, the following procedures for presenting those materials to the appellate court shall be used: . . . . discovery materials, including . . . motions to produce, and the like, pertinent to issues presented on appeal, may be set out in the record on appeal or may be sent up as documentary exhibits.

N.C. R. App. P. 9(a)(1)(e), (a)(1)(j), (c)(4) (2021). Notwithstanding the fact this sealed document is central to our ability to meaningfully review the issues presented in this appeal, Defendants failed to include it in the Record, send it as a documentary exhibit, or provide it under seal.

¶ 31 The failure to follow the rules of appellate procedure "ordinarily forfeit[s] [a party's] right to review on the merits." *Dogwood Dev. & Mgmt. Co. v. White Oak Transp. Co.*, 362 N.C. 191, 194, 657 S.E.2d 361, 363 (2008). "[T]he appellate court may not consider sanctions of any sort [including dismissal] when a party's noncompliance with nonjurisdictional requirements of the [appellate] rules does not rise to the level of a 'substantial failure' or 'gross violation.' " *Id.* at 199, 657 S.E.2d at 366. "In determining whether a party's noncompliance with the appellate rules rises to the level of a substantial failure or gross violation, the [appellate] court may consider, among other factors, whether and to what extent the noncompliance impairs the court's task of review." *Id.* at 200, 657 S.E.2d at 366.

¶ 32 Here, Defendants' Appellate Rules violation is the failure to include the document at issue in the Record on appeal. In the absence of this document, "we cannot, without engaging in speculation," assess the merits of the Order granting Plaintiff's motion, or the claim by Defendants

that the document is covered by medical review committee privilege under N.C.G.S. § 90-21.22A. *CRLP Durham, LP v. Durham City/Cty. Bd. of Adjustment*, 210 N.C. App. 203, 212, 706 S.E.2d 317, 323 ("From the record before us, we cannot [review the issue presented], without engaging in speculation . . . as [the] petitioner failed to include in the record on appeal any portion of the [document at issue]."), *disc. rev. denied*, 365 N.C. 348, 717 S.E.2d 744 (2011). This violation severely impairs our ability to conduct meaningful appellate review and rises to the level of a "substantial failure" and "gross violation." *Dogwood*, 362 N.C. at 199, 657 S.E.2d at 366.

¶ 33 Upon concluding the noncompliance rises to a level of a substantial failure or gross violation, the next step is to "determine which, if any, sanction under Rule 34(b) should be imposed. [] [I]f . . . dismissal is the appropriate sanction, [the final step is to] consider whether the circumstances of the case justify invoking Rule 2 to reach the merits of the appeal." *Id.* at 201, 657 S.E.2d at 367.

¶ 34 Rule 34(b) of the North Carolina Rules of Appellate Procedure provides:

> (b) A court of the appellate division may impose one or more of the following sanctions:
>
> (1) dismissal of the appeal;
>
> (2) monetary damages including, but not limited to,
>
> a. single or double costs,
>
> b. damages occasioned by delay,
>
> c. reasonable expenses, including reasonable attorney fees, incurred because of the frivolous appeal or proceeding;
>
> (3) any other sanction deemed just and proper.

N.C. R. App. P. 34(b) (2021). Dismissal is appropriate here because without the document at issue contained in the Record, we cannot determine whether the trial court erred in granting Plaintiff's motion to enforce the existing motion to compel. "[I]n a case such as this, and in order to ensure better compliance with the appellate rules, . . . dismissal is appropriate and justified." *Ramsey v. Ramsey*, 264 N.C. App. 431, 437, 826 S.E.2d 459, 464 (2019). The only way we could reach the merits of this case is by invoking Rule 2.

¶ 35 Rule 2 "may only [be invoked] on rare occasions and under exceptional circumstances to prevent manifest injustice to a party, or to expedite decision in the public interest[.]" *Dogwood*, 362 N.C. at 201, 657 S.E.2d at 367 (marks and citations omitted). The decision whether to invoke Rule 2 is purely discretionary and is "to be limited to occasions in which a fundamental purpose of the appellate rules is at stake, which will necessarily be rare occasions." *State v. Hart*, 361 N.C. 309, 316, 644 S.E.2d 201, 205 (2007) (marks omitted). Nothing in this matter demonstrates any "exceptional circumstances" to suspend or vary the appellate rules. *Dogwood*, 362 N.C. at 201, 657 S.E.2d at 367. The circumstances of this case do not justify invoking Rule 2, and I would decline to reach the merits of the case on that basis. However, because the Majority addresses the merits of the case and I disagree with its analysis and resolution, my dissent must also encompass the merits in the following sections. *See* N.C. R. App. P. 16(b) (2021) ("When the sole ground of the appeal of right is the existence of a dissent in the Court of Appeals, review by the Supreme Court is limited to a consideration of those issues that are (1) specifically set out in the dissenting opinion as the basis for that dissent[.]"). I would hold the Order should be affirmed for the reasons discussed in Parts B and C, below.

B. Burden of Production under N.C.G.S. § 90-21.22A

¶ 36 Even if the appeal was not dismissed for failure to produce the document at issue, I would nonetheless affirm the Order, as Defendants failed to produce evidence that they are entitled to the medical review committee privilege set forth in N.C.G.S. § 90-21.22A.

¶ 37 Located in Chapter 90, Article 1D of our General Statutes, N.C.G.S. § 90-21.22A provides:

> (a) As used in this section, the following terms mean:
>
> (1) "Medical review committee." - A committee composed of health care providers *licensed under this Chapter [90]* that is formed for the purpose of evaluating the quality of, cost of, or necessity for health care services, including provider credentialing. "Medical review committee" does not mean a medical review committee established under [N.C.G.S. §] 131E-95.
>
> (2) "Quality assurance committee." - Risk management employees of an insurer licensed to write medical professional liability insurance in this State, who work in collaboration with health care providers

> licensed under this Chapter, and insured by that insurer, to evaluate and improve the quality of health care services.
>
> (b) A member of a duly appointed medical review or quality assurance committee who acts without malice or fraud shall not be subject to liability for damages in any civil action on account of any act, statement, or proceeding undertaken, made, or performed within the scope of the functions of the committee.
>
> (c) The proceedings of a medical review or quality assurance committee, the records and materials it produces, and the materials it considers shall be confidential and not considered public records within the meaning of [N.C.G.S. §§] 132-1, 131E-309, or 58-2-100; and shall not be subject to discovery or introduction into evidence in any civil action against a provider of health care services who directly provides services and is licensed under this Chapter . . . , which civil action results from matters that are the subject of evaluation and review by the committee. . . . . However, information, documents, or records otherwise available are not immune from discovery or use in a civil action merely because they were presented during proceedings of the committee. . . . .
>
> (d) This section applies to a medical review committee, including a medical review committee appointed by one of the entities licensed under Articles 1 through 67 of Chapter 58 of the General Statutes.
>
> (e) Subsection (c) of this section does not apply to proceedings initiated under [N.C.G.S. §] 58-50-61 or [N.C.G.S. §] 58-50-62.

N.C.G.S. § 90-21.22A (2019) (emphasis added).

¶ 38 The parties dispute the burden required to demonstrate compliance with N.C.G.S. § 90-21.22A. Specifically, Plaintiff argues "Defendants had to affirmatively prove that all members of its nation-wide central medical review committee . . . were Chapter-90-licensed health care providers under North Carolina law." Defendants assert that because the term "health care provider" as used in N.C.G.S. § 90-21.22A(a)(1) is not defined in Chapter 90 general definitions, we must look to definitions con-

tained in other articles to interpret its meaning. Defendants specifically point to the definition of "health care provider" in N.C.G.S. § 90-21.11, located in Chapter 90, Article 1B of our General Statutes, which states, in pertinent part:

> The following definitions apply in *this Article [1B]*:
>
> (1) Health care provider. - Without limitation, any of the following:
>
> a. A person who pursuant to the provisions of Chapter 90 of the General Statutes is licensed, or is otherwise registered or certified to engage in the practice of or otherwise performs duties associated with any of the following: medicine, surgery, dentistry, pharmacy, optometry, midwifery, osteopathy, podiatry, chiropractic, radiology, nursing, physiotherapy, pathology, anesthesiology, anesthesia, laboratory analysis, rendering assistance to a physician, dental hygiene, psychiatry, or psychology.

N.C.G.S. § 90-21.11(1)(a) (2019) (emphasis added). Defendants' argument is unpersuasive, as the application of this proposed definition would contravene basic principles of statutory interpretation.

> Statutory interpretation properly begins with an examination of the plain words of the statute. If the statutory language is clear and unambiguous, the court eschews statutory construction in favor of giving the words their plain and definite meaning. However, where the statute is ambiguous or unclear as to its meaning, the courts must interpret the statute to give effect to the legislative intent. Canons of statutory interpretation are only employed if the language of the statute is ambiguous or lacks precision, or is fairly susceptible of two or more meanings.

JVC Enters. v. City of Concord, 376 N.C. 782, 2021-NCSC-14, ¶ 10 (citations and marks omitted). The plain words of N.C.G.S. § 90-21.22A indicate a medical review committee must be composed of "health care providers licensed under [Chapter 90.]" N.C.G.S. § 90-21.22A(a)(1) (2019). The statute is clear and unambiguous–it contains no contradictions, and it is not "fairly susceptible of two or more meanings." *JVC*, 376 N.C. 782, 2021-NCSC-14 at ¶ 10. Consequently, we must interpret its words in accordance with their plain and definite meaning, and need

not look to definitions in other articles, consider legislative intent, or employ other canons of statutory construction. *Id.* By its plain language, N.C.G.S. § 90-21.22A requires members of a medical review committee to be health care providers licensed under Chapter 90, to wit, to be licensed by North Carolina. In addition, N.C.G.S. § 90-21.11 explicitly states "[t]he following definitions apply *in this Article*[,]" and contains no indication that the definition of "health care provider" located in Article 1B in N.C.G.S. § 90-21.11(1) would apply to other articles within Chapter 90. N.C.G.S. § 90-21.11 (2019) (emphasis added).

¶ 39 "[D]efendants, as the parties objecting to the disclosure of the [document] on the basis of this privilege, bear the burden of establishing that [P]laintiff's discovery request[] fall[s] within the scope of the privilege." *Hammond v. Saini*, 229 N.C. App. 359, 365, 748 S.E.2d 585, 589 (2013), *modified and aff'd by* 367 N.C. 607, 766 S.E.2d 590 (2014). To satisfy their burden in claiming the medical review committee privilege, Defendants needed to prove to the trial court's satisfaction that every member of the qualifying medical review committee is a health care provider licensed under Chapter 90. N.C.G.S. § 90-21.22A(a)(1) (2019). Defendants attempted to meet their burden by filing an affidavit of Justin Otwell, Esq. ("Otwell"), the Vice President of Claims and Risk Management at an affiliate corporation of EMP. Otwell's affidavit "sets forth the procedure by which EMP set up its medical review committee and how materials are submitted to that committee." Otwell's affidavit states:

> At the time that Mr. Williams was seen by Ms. Allen, EMP had a central medical review committee. This was a committee composed of licensed healthcare providers which was formed for the purpose of evaluating the quality, costs and necessity for the healthcare services provided by EMP. It also was created and empowered to evaluate and improve the quality of healthcare services provided by EMP's doctors and physician's assistants.
>
> As part of the work of the medical review committee, providers could, in appropriate circumstances, provide information to the committee about patient care for evaluation by the committee. One way such information could be supplied to the committee in 2016 was via a computer program available at EMP locations throughout the country. A provider would enter information about the patient, and it

> would be transmitted to the medical review committee for evaluation.
>
> In the case of Mr. Williams, Ms. Allen supplied information to the medical review committee utilizing a computer terminal at CMC Pineville hospital. This information was supplied to the committee via a computer generated form. Attached to this affidavit as "Sealed Exhibit A" is the form generated by Ms. Allen in May 2016 and submitted to the committee with information about Mr. Williams. "Sealed Exhibit A" was used as part of the proceedings of the medical review committee at EMP and was generated for the purposes of that committee. This document was not created as part of the medical record in this case, and it is not a publicly available document.
>
> This document was provided to John Holden, our North Carolina counsel on [5 November 2019], at his request.
>
> It is my understanding that the activities and proceedings of a medical review committee, including the materials it considers, shall be confidential and are not public records under [N.C.G.S. §] 90-21.22A. The document attached to this affidavit as "Sealed Exhibit A" is part of the proceedings of the committee and was generated for the use of the committee in evaluating patient care. As such, I would respectfully request that it be withheld from discovery.
>
> It is imperative that the actions of medical review committees be confidential and that the materials considered and generated by them not be utilized in litigation, to ensure full openness in the activities of the committee. These committees are utilized by medical organizations, including EMP, to improve patient care and as a learning tool for clinicians.

¶ 40 Defendants asserted Otwell's affidavit demonstrated the document at issue "clearly falls within the privilege set forth in [N.C.G.S.] § 90-21.22A for medical review committee documentation." However, nowhere in his affidavit does Otwell state the names of the members of the committee or their status as health care providers licensed under Chapter 90 of the North Carolina General Statutes. While arguments

alone would not carry Defendants' burden as they are not evidence, it is important to note that at no point in their arguments at the trial court or on appeal have Defendants argued that the committee is "composed of health care providers licensed under [Chapter 90.]" N.C.G.S. § 90-21.22A(a)(1) (2019). By failing to include information plainly required for an assertion of medical review committee privilege under N.C.G.S. § 90-21.22A, Defendants did not meet their burden of production, much less any burden of proof, and are not entitled to the privilege they seek. For this reason, I would affirm the Order.

C. Defendants' "Requested" Findings Concerning N.C.G.S. § 90-21.22A

¶ 41 The Majority states "[t]he trial court did not make the requested findings of fact or conclusions concerning [the] statutory elements [in N.C.G.S. § 90-21.22A]" and holds the Order must be "remanded for factual findings and conclusions." *Supra* at ¶¶ 22, 24. I disagree. Defendants failed to make a specific request to the trial court for findings of fact and the trial court was under no obligation to provide findings of fact in the Order. For these reasons, it is unnecessary to remand the Order to the trial court.

¶ 42 Rule 52 of the North Carolina Rules of Civil Procedure, which governs findings by a trial court, provides:

> Findings of fact and conclusions of law are necessary on decisions of any motion or order ex mero motu *only when requested by a party* and as provided by Rule 41(b).[2] Similarly, findings of fact and conclusions of law are necessary on the granting or denying of a preliminary injunction or any other provisional remedy only when required by statute expressly relating to such remedy or requested by a party.

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2. Rule 41(b) of the North Carolina Rules of Civil Procedure, which specifically pertains to the dismissal of actions, provides: "After the plaintiff . . . has completed the presentation of his evidence, the defendant, without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. The [trial] court as trier of the facts may then determine them and render judgment against the plaintiff or may decline to render any judgment until the close of all the evidence. If the [trial] court renders judgment on the merits against the plaintiff, the [trial] court shall make findings [of fact] as provided in Rule 52(a)." N.C.G.S. § 1A-1, Rule 41(b) (2019). Here, the trial court entered an interlocutory order; it did not grant a motion to dismiss the proceedings. Thus, the trial court was not required to make findings of fact in its Order under Rule 41(b).

N.C.G.S. § 1A-1, Rule 52(a)(2) (2019) (emphasis added). Citing our Supreme Court's decision in *Coble v. Coble*, 300 N.C. 708, 714, 268 S.E.2d 185, 190 (1980), the Majority asserts that "[w]hen requested, the trial court's findings of fact and conclusions of law must be sufficiently detailed to allow for meaningful appellate review." *Supra* at ¶ 22. However, the Majority's reliance on *Coble* is taken out of context.

¶ 43 In *Coble*, the defendant challenged a trial court's order requiring her to provide partial child support on the grounds that she was capable of contributing child support payments and the plaintiff was entitled to contribution from her. *Coble*, 300 N.C. at 709, 268 S.E.2d at 187. Our Supreme Court remanded the case for further evidentiary findings and stated:

> [T]he requirement that the [trial] court make findings of those specific facts which support its ultimate disposition of the case is . . . to allow the appellate courts to perform their proper function in the judicial system.
>
> Under [N.C.G.S. § 50-13.4(c)] an order for child support must be based on the interplay of the trial court's conclusions of law as to (1) the amount of support necessary to meet the reasonable needs of the child and (2) the relative ability of the parties to provide that amount. *These conclusions* must themselves be based upon factual *findings* specific enough to indicate to the appellate court that the judge below took due regard of the particular estates, earnings, conditions, and accustomed standard of living of both the child and the parents.
>
> . . . .
>
> Effective appellate review of an order entered by a trial court sitting without a jury is largely dependent upon the specificity by which the order's rationale is articulated. Evidence must support findings; findings must support conclusions; conclusions must support the judgment.

Id. at 712, 714, 268 S.E.2d at 1889, 190. (citations and marks omitted) (emphasis added). This language demonstrates the order in *Coble* was remanded for "further evidentiary findings" due to the trial court's failure to comply with the specific requirements for an order for child support under N.C.G.S. § 50-13.4(c). *Id.* at 714, 268 S.E.2d at 190. Given that the

present case does not involve an order under N.C.G.S. § 50-13.4(c), the Majority improperly relies on *Coble* in support of a premise for which it does not stand.

¶ 44 Further, contrary to the Majority's assertion (without reference to the Record), Defendants did not specifically request that the trial court make any findings of fact at the hearing held on 31 January 2020. *Supra* at ¶ 23. Defense Counsel had the following exchange with the trial court:

> THE COURT: . . . . I'm going to direct that that document be provided to [] [P]laintiff. Now, at this time, I'll retain it under seal (clears throat) in the file . . . .
>
> [DEFENSE COUNSEL]: Well, Your Honor, that's what I wanted to clarify because as you know the, uh, legitimate and bona fide assertion of a privilege, even is – is not an interlocutory appeal. So, I just need – if the [c]ourt can clarify and perhaps this can be worked out, whether you are ruling the privilege was waived, the privilege doesn't apply, the privilege is – somehow defeated so that we can establish the parameters of the argument for [the] Court of Appeals –-
>
> THE COURT: Uh-huh.
>
> [DEFENSE COUNSEL]: –- if that should be the case.
>
> . . .
>
> [PLAINTIFF'S COUNSEL]: Your Honor, not to object, but it may help if the question is posed as, "Are you granting the [m]otion for 37(b) to enforce an existing order?"
>
> THE COURT: Yes, yes.
>
> [DEFENSE COUNSEL]: So, you'll – so, if that – so, the [c]ourt's order, as I understand it is that the peer review privilege that was identified in the original privilege log was the subject of the or- of the argument before Judge Ervin is overruled and it is – the privilege is (inaudible) as to this document, that you have found?
>
> THE COURT: The – what my ruling is specifically is that the issues before me today were encompassed by the order of Judge Ervin, and therefore my order

is pursuant to Rule 37(b) that, um, [] [P]laintiff is entitled to enforce the order of Judge Ervin and that enforcement will require the production of this particular document.

. . . .

[DEFENSE COUNSEL]: . . . . So, you're saying you're basing – you're enforcing his prior ruling, even though our position is it was a different document that we were arguing about in front of him? You're saying it was the same document and the argument ---

THE COURT: I'm not saying it's the same document. I'm saying that this document was responsive to the request for discovery that were [sic] before Judge Ervin at that time. So, that in response to those discovery requests, this document should have been identified and if a privilege was claimed, it should've been asserted as to this particular document.

[DEFENSE COUNSEL]: Okay. Because today we've had a lot of arguments about the nature – we've had arguments about the nature of the committee that reviewed it in the system and all that. I just want to know if that's going to be part of the issue that's going to be taken into – that could be potentially taken up. I don't know. I assume my client is going to want to partiprotect their – their medical review committee and that's not casting (inaudible) on anyone in this room ---

THE COURT: I know.

[DEFENSE COUNSEL]: --- I'm just saying, I assume that's going to be their position.

THE COURT: Sure.

[DEFENSE COUNSEL]: So, it needs to be as – as clear as we can get it. So, you know, I don't know if [Plaintiff's Counsel] and I can go back and forth and find something that would – that would satisfy, Your Honor.

THE COURT: Yeah. Why don't – y'all [Defense Counsel and Plaintiff's Counsel] work on the order

> and I'll take a look at what you draft, and we'll go from there. . . .
>
> . . . .
>
> [DEFENSE COUNSEL]: Is it your position it's the same doc – because he was looking at a document and he ordered it to be produced and we produced it ---
>
> THE COURT: Yeah.
>
> [DEFENSE COUNSEL]: --- and now we're being told that we didn't comply with his order by producing a different document. So, that's what I'm trying to figure out how to – how to craft this. I understand the [c]ourt's ruling, I just want to put it in a box where I can explain it.
>
> THE COURT: Yeah, I don't know that I can answer that question until I can see each version of the proposed orders.
>
> . . . .
>
> THE COURT: All right. Anything else we need to address?
>
> [DEFENSE COUNSEL]: No.

¶ 45 This exchange demonstrates that Defense Counsel sought clarification pertaining to the trial court's ruling on the privilege to "establish the parameters of the argument" for an appeal, and stated that he "[understood] the [c]ourt's ruling," but wanted "to put it in a box where [he could] explain it." When the trial court declined to answer Defense Counsel's questions at the time, and asked if anything else needed to be addressed, Defense Counsel replied "[n]o." Based on this exchange, it is apparent that Defendants only requested detailed conclusions of law, but made no specific request for the trial court to make findings of fact in accordance with Rule 52, and accordingly, the trial court was under no obligation to make such findings. *See Brown v. Brown*, 47 N.C. App. 323, 325, 267 S.E.2d 345, 347 (1980) ("[T]he record fails to show that [the] defendant requested [] findings [of fact] . . . . Absent request, the [trial] court is not required to find facts . . . ."); *Kolendo v. Kolendo*, 36 N.C. App. 385, 386, 243 S.E.2d 907, 908 (1978) ("[I]f no request is made by the parties to a hearing on a motion, then the trial [court] is not required to find the facts upon which he bases his ruling.").

¶ 46 As no findings of fact were specifically requested by Defendants, and were not required by statute, we must "presume[] that the [trial] court on proper evidence found facts to support its judgment." *Brown*, 47 N.C. App. at 325, 267 S.E.2d at 347. Adopting this presumption, I would hold it is patently unnecessary to remand this matter for further evidentiary findings.

CONCLUSION

¶ 47 Defendants failed to include the document at issue in the Record on appeal, send it as a documentary exhibit, or provide it under seal. This failure was a violation of the appellate rules, and due to the severe impact on our ability to conduct meaningful appellate review, Defendants' noncompliance rose to the level of a substantial failure and gross violation. Dismissal is the appropriate remedy under Rule 34, and the circumstances of this case do not justify invoking Rule 2.

¶ 48 Setting aside this violation, as the Majority implicitly does, I reach the merits and fully dissent from the Majority's analysis. I would hold the Order should be affirmed. Defendants failed to produce evidence that they are entitled to the medical review committee privilege set forth in N.C.G.S. § 90-21.22A. In addition, Defendants did not specifically request that the trial court make any findings of fact and the trial court was not obligated under any authority to do so. For these reasons, I disagree with the Majority's decision to remand for further findings and respectfully dissent.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 3 AUGUST 2021)

ETHEL P. GOFORTH PRIMARY TR. v. LR DEV.-CHARLOTTE, LLC 2021-NCCOA-411 No. 20-558	Iredell (17CVS361)	AFFIRMED AND MODIFIED IN PART; REVERSED AND REMANDED IN PART.
IN RE N.T. 2021-NCCOA-412 No. 20-891	Forsyth (18JA123) (18JA124) (18JA125)	Vacated and Remanded
STATE v. BOSTON 2021-NCCOA-413 No. 20-674	Buncombe (17CRS93691)	Dismissed
STATE v. BRISBON 2021-NCCOA-414 No. 20-408	Rutherford (18CRS51942) (19CRS253)	No Error
STATE v. CRAWFORD 2021-NCCOA-415 No. 20-502	Burke (19CRS588-589)	No Error
STATE v. ELLER 2021-NCCOA-416 No. 20-342	Wilkes (18CRS52377) (18CRS52381) (18CRS52383) (19CRS64-67)	NO ERROR IN PART; VACATED IN PART AND REMANDED.
STATE v. GREEN 2021-NCCOA-417 No. 20-456	Forsyth (18CRS53210)	Affirmed
STATE v. GREENE 2021-NCCOA-418 No. 20-598	Wake (18CRS216077)	No Error
STATE v. MARTIN 2021-NCCOA-419 No. 20-738	Avery (18CRS50492) (19CRS93)	NO PLAIN ERROR IN PART; VACATED IN PART AND REMANDED FOR RESENTENCING
STATE v. O'KELLY 2021-NCCOA-420 No. 20-693	Durham (15CRS59450)	Reversed

STATE v. PRYOR 2021-NCCOA-421 No. 20-363	Brunswick (18CRS1288) (18CRS51737) (19CRS1771-72)	Affirmed

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